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IN THE

SUPREME COURT OF THE

UNITED STATES

October Term 1969

No. [redacted] 115

A. R. INDUSTRIES, a corporation,

Petitioner,

vs.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF SACRAMENTO,

Respondent,

and

FRANK CERVANTES,

Real Party in Interest.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL, THIRD APPELLATE DISTRICT, STATE OF CALIFORNIA

BURTON J. STANLEY
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Wells Fargo Bank Bldg.
Sacramento, California

MICHAEL C. GESSFORD

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL, THIRD APPELLATE DISTRICT, STATE OF CALIFORNIA

Petitioner prays that a writ of certiorari issue to review the judgment of the Court of Appeal of the Third Appellate District, State of California, entered in the above-entitled case on December 20, 1968.

CITATIONS TO OPINIONS BELOW

The opinion of the trial court on petitioner's motion to quash service of summons is unreported and a copy of said order is printed in Appendix B hereto. The opinion of the Court of Appeal, Third Appellate District, State of California is reported in 268 A.C.A. 344, and a copy of said opinion is printed and set forth in Appendix B.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3) in that petitioner contends that maintenance of the above suit in California violates petitioner's rights under the Due Process Clause of the United States Constitution. The trial court in this matter issued an order denying petitioner's motion to quash service of summons on June 3, 1968. A timely petition for writ of mandate was made to the Court of Appeal, Third Appellate District, State of California. Briefs were filed and the matter argued. On December 19, 1968, the Court of Appeal filed its opinion, denying petitioner the writ sought. A timely petition for hearing was filed in the California Supreme Court. On February 13, 1969, the California Supreme Court filed its order summarily denying the petition for hearing. A copy of said order is set forth in Appendix B. Petitioner, having exhausted its state remedies, now seeks relief in this Court.

QUESTIONS PRESENTED

Whether on the facts of this case, maintenance of the present suit in California deprives petitioner of its rights under the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

STATUTE INVOLVED

The statutory provision involved is §1 of Amendment XIV to the United States Constitution. It is printed in Appendix A attached hereto.

STATEMENT

This lawsuit arises out of an incident which occurred on or about the 27th day of December, 1966, when the plaintiff and real party in interest allegedly incurred injuries while operating a buffing machine within the course and scope of his employment at the Formica Plant in Roseville, California. The buffing machine was manufactured by petitioner and the real party in interest alleges that said machine was defective.

The complaint was filed on or about December 26, 1967. On March 14, 1968 petitioner filed a motion to quash service of summons on the basis that petitioner was not doing business within the State of Californis, and, therefore,

in accordance with the Due Process Clause of the United States Constitution, was not amenable to suit in California. In support of petitioner's motion, points and authorities and affidavits were filed. Copies of said affidavits are reprinted in Appendix C attached hereto. As regards the question of doing business, the plaintiff and real party in interest served a set of interrogatories on defendant and copies of said interrogatories and petitioner's answers thereto are attached in Appendix C.

On June 3, 1968, a hearing on petitioner's motion to quash service of summons was held in the Superior Court of the State of California in and for the County of Sacramento. Subsequent to hearing, the Court issued its decision, denying the motion to quash service of summons.

A timely petition for writ of mandate was filed in the Court of Appeal, Third Appellate District, State of California. Briefs were filed by both sides and the matter came on for argument. Subsequent to argument, the Court of Appeal, on December 19, 1968, filed its opinion denying the petition for mandate.

A timely petition for hearing was filed in the California Supreme Court; however, on February 13, 1969, the Court summarily denied a hearing.

REASONS FOR GRANTING THE WRIT

1. The rulings of the California courts which compel petitioner to appear and defend an action in the California courts are inconsistent with fundamental tenets of the Federal Constitution and result in a deprivation of petitioner's rights under the Fourteenth Amendment to the United States Constitution. The oft-stated rules applicable to the present matter are deceiving in their apparent simplicity: If petitioner is "doing business" within California, then petitioner has sufficient contact with the state so that maintenance of the California action does not violate petitioner's rights under the Due Process Clause of the Federal Constitution. On the other hand, absent sufficient minimal contacts with California, the California courts cannot constitutionally assume jurisdiction. Petitioner is confident that this Court is more cognizant of these rules than petitioner. Petitioner is also confident that this Court is aware of the divergence in the numerous opinions of the lower courts seeking to apply the rules to the cases at hand. With this in mind, petitioner declined filing a long, extensive petition wherein numerous decisions of lower tribunals are considered. Rather, petitioner will present its case with reference to the controlling law of this land, the Constitution of the United States, and its interpretation by this Court.

In its decisions over the years, this Court has recognized that changes in technology and economics antiquate a particular rule of law and necessitate its modification or rejection. A review of the relevant decisions of this Court as regards the jurisdictional issue involved in this case is clear evidence of this. Certainly, there has been a vast expansion of the jurisdictional power of the respective states. This factor was specifically noted by this Court in McGee v. International Life Insurance Co., 355 U.S. 220 (1957). This expansion of the jurisdictional power of the respective states necessarily tends to obliterate territorial restrictions on the jurisdiction of state tribunals. This apparently was of sufficient concern to this Court so that in its latest decision directly on point, the Court states:

> "But it is a mistake to assume that this trend heralds the eventual demise of all restrictions on the personal jurisdiction of state courts. [Citations omitted]. Those restrictions are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective states. However minimal the burden of defending in a foreign tribunal, a defendant may not be called upon to to so unless he has had the 'minimal contacts' with that state that are a prerequisite to the exercise of power over him." Hansen v. Denckla, 357 U.S. 235, 251.

In rendering its decision in Hansen, this Court was not unmindful of the earlier cases of International Shoe Company v. Washington, 326 U. S. 310 and McGee v. International Life Insurance Co., supra, as the Court notes these decisions in its opinion. This Court also set down a guideline for all lower courts to utilize when faced with the issue of whether a particular defendant is "doing business" within the forum state. The following language of this Court in Hansen is of particular significance here. As stated by the Court:

> "The unilateral activity of those who claim some relationship with a non-resident defendant cannot satisfy the requirement of contact within the forum state. The application of that rule will vary with the quality and nature of the defendant's activity, but it is essential in each case that there be some act by which the defendant purposely availed itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws." (253) [emphasis added].

This Court, in exercising its role as the supreme interpreter of our Federal Constitution, requires that before a non-resident defendant can constitutionally be sued in the forum state it must be established that the defendant has done some act by which the defendant "purposely availed" itself of the privilege of conducting activities "within" the forum state, thereby

invoking the benefits and protections of its law. Using the language of this Court as the cornerstone of petitioner's contention, we now turn to the facts of this case. Review of these facts demonstrates that petitioner at no time availed itself of the privilege of conducting activities within the State of California, and has never invoked the benefits and protections of California laws. The uncontradicted affidavit of Mr. Albert Reckman, the president of petitioner, establishes that petitioner has not and never has been licensed to do business in California; that petitioner has never maintained offices in the State of California; that petitioner has never been qualified with any governmental agency in the State of California; that petitioner does not own any property in the State of California; that petitioner has never maintained any bank account in the State of California; that petitioner has never advertised locally in any manner in the State of California; that petitioner has never been listed in any telephone directory in the State of California; that petitioner has never been listed in any publication, official or unofficial, with listing for California businesses; that petitioner has never maintained any California offices, warehouses, stock, materials, agents, representatives, employees or the like; that petitioner does not ship goods on consignment into California or ship goods to California where the company retains title to said goods; that petitioner has never had any listing of any offices or agents in the State of California; and that petitioner has never employed any person for the purpose of soliciting sales or services in the State of California.

As regards the particular transaction involved in the present lawsuit, a review of the material filed demonstrates that no part of the transaction took place in the State of California. This point is conceded by the Court of Appeal of the State of California in and for the Third Appellate District in its opinion, where on page two it states: "All transactions regarding the purchase and sale were handled between the seller and buyer in either New Jersey or Ohio." In essence, we have a contract between a New Jersey corporation and petitioner, an Ohio corporation. Petitioner agrees to manufacture a buffing machine in accord with specifications provided by the New Jersey corporation. The New Jersey corporation directs that the machine be delivered to its plant in Roseville, California. In accord with these directions, petitioner placed the buffing machine on a common carrier for delivery to the New Jersey corporation's California plant. The machine was not sent on consignment and title was not retained by petitioner. Each and every transaction involving the machine took place between New Jersey and Ohio. The sole contact between petitioner and California is that the buffing machine, manufactured by petitioner for the New Jersey corporation, was delivered at its California plant. There is nothing else. If on these facts, petitioner has purposely availed itself of the privilege of conducting activities within California so as to subject it to suit in California, there is no "doing business" requirement which protects petitioner's supposed rights under the Due Process Clause of the Federal Constitution. The Court of Appeal for the

State of California also relies on the fact that petitioner advertised in national magazines to support its decision that California can constitutionally maintain the suit against petitioner. Petitioner submits this is a weak straw upon which to build so big a house, as the declaration of Mr. Reckman specifically notes that advertising was done in trade journals and specifically directed at the mid-western states. In this regard, it is important to note that at no time during all of the proceedings relating to the jurisdictional issue, did the plaintiff and real party in interest produce even one item of advertising literature by petitioner that was directed to California residents or found in California.

Based upon the facts recited above the California court concluded that the "minimum contacts" necessary for constitutional jurisdiction had been established and that petitioner; in some unstated way, was conducting activities within California, thereby deriving the benefits and protections of its laws. With all due respect to the California courts, petitioner cannot understand how in any way petitioner received any benefit or protection from the laws of California. The sale between the New Jersey corporation and petitioner was completed. The buffing machine no longer belonged to petitioner. Pursuant to the directions of the New Jersey corporation, the owner of the buffing machine, it was placed on a common carrier for transportation to the owner's plant in California. In no way did petitioner derive any benefit or protection from the laws of the State of

California. The total lack of any showing of such benefits or protections by the Court of Appeal establishes, at least to petitioner's satisfaction, that the Court of Appeal itself could not see any real benefit or protection afforded petitioner as regards the sale of the buffing machine.

Having almost summarily dismissed the essential question of whether petitioner had the minimal contacts with California sufficient so that the present suit against petitioner can constitutionally be maintained within the state, the court turned to the question as to where it is fair to try the lawsuit. In dealing with the question of fairness the rights of a particular defendant are just as important as the rights of the plaintiff. In the past years, this Court has justly and wisely given full meaning to the constitutional rights of a defendant in a criminal action. The constitutional rights of a defendant in a civil action are just as important and just as deserving of full protection. In its opinion, the Court of Appeal, Third Appellate District, in and for the State of California concludes, based upon the language of the California Supreme Court in Fisher Governor Co. v. Superior Court, that the scales "tip heavily in favor of permitting Cervantes to maintain his cause of action in California." No support is given this bald statement by the Court. To the contrary, petitioner contends that even if there was no constitutional problem, maintenance of the suit in California is decidedly unfair. In support of its contention, petitioner notes that the suit alleges that the buffing machine was

defectively designed and/or manufactures. In essence, this is a products liability case. Of course, this means strict liability if the product is in fact found to be defective. The practical effect of products liability law in California is to shift the burden of proof to the defendant. (See: Elmore v. American Motors Corp., 70 A.C.A. 615, 620, where the California Supreme Court affirms that a plaintiff is entitled to establish the existence of a defect in a products liability case by circumstantial evidence.) 1/ To meet this burden the manufacturer must rely upon qualified technical witnesses, namely, design engineers, production engineers, quality control personnel, operating technicians, production men, servicemen, etc., etc. As regards the present case, these are all people located at insured's place of business in Ohio. If suit is maintained in California, it will be necessary to transport these people from their homes and jobs to California for purposes of trial. These are not professional witnesses who are paid to go from trial to trial but are the average working American. What is fair about making them come to California? On the other hand, how much of an inconvenience is there for plaintiff to bring the suit against petitioner in the state where petitioner does engage in business? Since the allegations of the complaint are based

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1/ For the Court's information, the Elmore opinion and the opinions rendered in other cases specifically referred to in the petition are attached hereto in Appendix A.

upon defect in a machine, the only people who would have to make the trip to Ohio are those intimately involved in the lawsuit: the plaintiff, plaintiff's attorney, and any paid witnesses, expert or otherwise, the plaintiff retains to render an opinion as to the buffing machine involved. (On this point see: Buckeye Boiler Co. v. Superior Court, 269 A.C.A. 129, 137-138.)

Petitioner does not submit to this Court that the balancing process that takes place is all black or all white. Whenever a balancing process takes place, there obviously has to be something on each side, or there just is no balancing. Petitioner does submit, however, that based upon the facts in the present case, it cannot visualize upon what factors the Court of Appeal came to its conclusion that the scales tip heavily in favor of maintenance of the suit in California.

In its decision, the Court of Appeal of the State of California relies upon the decision of this Court in McGee v. International Life Insurance Co., supra. The distinguishing features between McGee and the present case are readily apparent. In McGee it was uncontradicted that the defendant solicited a reinsurance agreement with the insured, a California resident; that the offer was accepted in California, and that insurance premiums were subsequently paid from California until the time of the insured's death. It is apparent that in McGee, there were contacts between the non-resident defendant and the State of California. As

indicated above, no such contacts exist in this case.

There is a definite trend by many courts in this land to implement a social security system through the courts whereby every person injured is "made whole" by some defendant. To this end, some courts bend over backwards, close their eyes to the rights of defendants, and just plain do not do justice. In many cases where the defendant is a corporation, this trend is based upon the premise that the corporate defendant can afford to compensate an injured person, even though it was really not at fault. Disregarding the question of fairness, this premise may have some validity when applied against one of the monolithic corporations in existence in this country. On the other hand, it has absolutely no validity when applied against the small business, whose assets are in many cases just as limited and just as tied up as those of the persons injured. If this trend results in a deprivation of rights of defendants, the deprivation applies equally to the little fellow as well as the big fellow, the only difference being that the little fellow really feels it. This is the situation in the present case, as petitioner is not General Motors or Ford. But even if petitioner were the largest corporation in the world, with unlimited assets, under our system of law, it is guaranteed as full protection of its constitutional rights as the smallest, loneliest individual. As indicated by the above, petitioner respectfully submits to this Court that the rulings of the California courts in effect obliterate its rights under the

Fourteenth Amendment to the Federal Constitution. Before suit can constitutionally be maintained in California, it must be established that petitioner purposely availed itself of the privilege of conducting activities within California. This is the essential element set by this Court, as guardian of the constitutional rights of all persons within the United States of America. Petitioner has attempted to demonstrate to this Court that realistically one cannot say that petitioner engaged in any activities "within" the State of California; that realistically petitioner was not doing business within the State of California; and realistically, that petitioner in no way invoked the benefits and protections of the laws of the State of California. In the absence of these factors, petitioner respectfully submits that in accord with this Court's decision in Hansen v. Denckla, the maintenance of the present suit in the State of California deprives petitioner of its rights under the Due Process Clause of the United States Constitution.

2. The second reason why this Court should grant the present petition is to afford this Court the opportunity to render its authoritative opinion, clearing up the confusion regarding just what activities are sufficient to constitutionally permit a state to maintain suit against a non-resident defendant. As indicated earlier in this petition a review of the opinions of the lower courts, both state and Federal, reveal a wide divergence in opinion as to what activities of a non-resident defendant are sufficient to make it amenable to suit in the forum state.

The decisions in many cases conflict with each other. To refer this Court to the numerous decisions would require a voluminous brief and serve only to advise the Court of what is apparent. Petitioner does take this opportunity, however, to point out to this Court a few specific cases.

Subsequent to the decision of this Court in Hansen v. Denckla, supra, lower courts have continually expanded the jurisdiction of the respective state courts. This has reached a point where some courts have drifted away from the guidelines laid down in Hansen, that before suit can be maintained, there must be some act by which the defendant purposely avails itself of the privilege of conducting activities within the forum state. In California, there are appellate decisions indicating that in a products liability case, the minimum contacts requirement is met if it was foreseeable that the manufacturer's product would be sold to California consumers. (In this regard, see Buckeye Boiler Company v. Superior Court, 269 A. C. A. 129 and Agalite-Bronson Company v. K. G. Ltd., 270 A. C. A. 339.) 2/ Petitioner submits to this Court that this is an unwarranted extension of the guidelines set forth in Hansen. Furthermore, under the present nationalization of commerce in this country, a factor noted by this Court in McGee, a foreseeability test would provide absolutely no protection to a non-resident defendant's Due Process

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2/ See Appendix A attached hereto.

rights as a trial court could always find, no matter what the product or the location of the manufacturer, under our present system of commerce it is foreseeable that the product will be sold to a consumer in any one of the 50 states. It should also be noted that the decision of the Court of Appeal of the State of California in the Buckeye case referred to above, is inconsistent with the decision of the Court of Appeal in the present matter. The above-cited opinions also refer to numerous other cases which, on highly similar facts, come out with contradictory results.

In its opinion, the Court of Appeal in this matter, finds authoritative and cites with approval the opinion of the court in the case of Gray v. American Radiator, 176 N. E. 2d 761. The Gray case in effect holds that a mere isolated act provides sufficient contact with the forum state and permits maintenance of the suit. The United States District Court of Appeals for Maryland in the subsequent case of Beatty v. M. S. Steel Company, 276 F. Supp. 259, in considering the import of Gray, states:

> "Furthermore, although the precise question has not as yet been presented to the state or Federal courts in Maryland, this Court concludes that the Gray case would not be followed by the Maryland Court of Appeals. It would offend traditional notions of fair play and substantial justice to hold that a non-resident corporation could be sued in Maryland merely because on one

occasion its product, manufactured in another state, was shipped into and used within this state." (Page 263).

The Gray case deals with a situation directly analogous to the present lawsuit and the language of the Court specifically indicates that given the facts of the present case, that court would find it constitutionally impermissible for California to maintain the present action.

The above cases do not even begin to scratch the surface of the confusion in the reported decisions regarding the issue as to just what are the constitutional limitations regarding maintenance of an action against a non-resident defendant. They serve only to point out to this Court that this is a major issue of nation-wide concern which requires the consideration of this Court and the rendering of its opinion, clarifying the matter. This opinion is necessary not only to guide the courts in ruling on such matters, but also to afford the business community with guidelines so that an individual business or corporation can regulate its conduct in such a manner as to avoid activities which will subject it to a lawsuit thousands of miles away from the area where it operates and maintains its business.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

BURTON J. STANLEY

Attorney for Petitioner

APPENDIX "A"

CONSTITUTION
AMENDMENT XIV.

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

[Civ. No. 24432. First Dist., Div. Four. Feb. 28, 1969.]

AGALITE-BRONSON COMPANY, Plaintiff and Appellant, v. K. G. LIMITED, Defendant and Respondent.

[1] Corporations--Foreign Corporations--Doing Business.--In a suit against a foreign corporation, the burden of showing that a corporate defendant was doing business in this state in the sense required to make it amendable to process here lies on the plaintiff.

[2] Id.--Foreign Corporations--Actions.--The question before an appellate court as to whether a foreign corporation was doing business in this state, thus making it subject to process under Code Civ. Proc., §411, subd. 2, is one of law insofar as the facts are not in dispute.

[3] Appeal--Review--Scope--Implied Findings.--To the extent that a trial court has adjudged disputed factual contentions, an appellate court is bound by its implied findings in favor of the prevailing party.

[4] Process-Service Upon Foreign Corporations.--In a buyer's products liability

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McK. Dig. References: [1] Corporations, §898; [2] Corporations, §900; [3] Appeal and Error, §971(1); [4, 5] Process §57(0.5).

action against a Danish corporate manufacturer of a glass tempering plant, not formally qualified to do business in this state, and its California associate, the Danish corporation was doing business in this state, in essence present within the state sufficiently to constitute it just and equitable that the corporation be amenable to process, equivalent to due process requirements, where its California associate was its exclusive representative for sales in this state though sales other than to plaintiff were not made; where, although title to the plant may have passed to plaintiff in Denmark, the parties contemplated that successful operation would be accomplished in this state before final payment in connection with which a specialist and a sub-director were sent to this state from Denmark; where the Danish corporation evinced continual interest in future California sales, understanding that these would be related to plaintiff's plant operation though but a single completed sale was involved; and where it was foreseeable to the Danish corporation that the plant's failure might (and did) produce litigation in this state.

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[4] Products liability; in personam jurisdiction over nonresident manufacturer or seller under "long-arm" statutes, note, 19 A. L. R. 3d 13. See also Cal. Jur. 2d, Foreign Corporation, §34 et seq; Am. Jur. 2d, Foreign Corporations, §466 et seq.

[5] Id. --Service Upon Foreign Corporations. --In a buyer's product liability action against a Danish corporate manufacturer of a glass tempering plant, not formally qualified to do business in this state, and its California associate, a greater amount of justice appeared afforded to the parties by allowing suit in this state rather than requiring it elsewhere, where the Danish corporation was "doing business" in this state, where the state was interested in providing a forum for its resident plaintiff, where evidence appeared equally available in this state, where there was no choice of forum other than this state or Denmark, neither convenient to both parties, where the better choice for avoiding a multiplicity of suits was to require the Danish corporation to defend the action here, and where the cause of action arose in large part by the Danish corporation's local activities directly and through its California associate.

APPEAL from an order of the Superior Court of Alameda County granting a motion to quash service of summons. William H. Brailsford, Judge. Reversed.

Breed, Robinson & Stewart for Plaintiff and Appellant.

Thelen, Marrin, Johnson & Bridges for Defendant and Respondent.

DEVINE, P. J. --Plaintiff corporation, herein called "Agalite," appeals from an order granting a motion to quash service of summons on K. G. Limited, herein called "K. G." The question is whether K. G., a Danish corporation, was doing business in California, thus making it subject to process under section 411, subdivision 2 of the Code of Civil Procedure.

The complaint on which the summons was issued contains allegations under nine counts against K. G. and M. L. Burke Company, a California corporation (which, having acted throughout by its president, M. L. Burke, is referred to herein simply as "Burke"). The counts are upon various alleged warranties, express or implied, on fraud connected with the warranties, and on negligent manufacture of a product.

The motion to dismiss was heard upon a mass of evidence: declarations under penalty, voluminous correspondence, a diary and nine depositions. The depositions were not actually put into evidence (it seems, from remarks of counsel, out of mercy for the trial judge) and are not before us; but each counsel makes reference in the briefs, without objection from his adversary, to parts of the depositions. The motion was granted without any memorandum, and although the judge made certain comments as the hearing progressed, which are referred to in the briefs, they are not very significant at this point, because, the comments having been made during the flow of argument, we cannot be sure what were the final views of the

judge, except his single dispository conclusion. The rules of proof which guide us are:

[1] 1. The burden of showing that a corporate defendant is doing business in this state lies on the plaintiff. (Brown v. Birchfield Boiler, Inc., 226 Cal. App. 2d 487 [38 Cal. Rptr. 92]; Brunzell Const. Co. v. Harrah's Club, 225 Cal. App. 2d 734, 742 [37 Cal. Rptr. 659]; Yeck Mfg. Corp. v. Superior Court, 202 Cal. App. 2d 645, 649 [21 Cal. Rptr. 51]; Holtkamp v. States Marine Corp., 165 Cal. App. 2d 131, 137 [331 P. 2d 679].)

[2] 2. The question before the appellate court is one of law in so far as the facts are not in dispute. (Cosper v. Smith & Wesson Arms Co., 53 Cal. 2d 77, 81 [346 P. 2d 409]; Long v. Mishicot Modern Dairy, Inc., 252 Cal. App. 2d 425, 427-428 [60 Cal. Rptr. 432]; H. Liebes & Co. v. Erica Shoes, Inc., 237 Cal. App. 2d 25, 30-31 [46 Cal. Rptr. 470]; Sims v. National Engineering Co., 221 Cal. App. 2d 511, 513 [34 Cal. Rptr. 537]; Emsco Pavement etc. Corp. v. City of Los Angeles, 176 Cal. App. 2d 760, 766 [1 Cal. Rptr. 814].)

[3] 3. To the extent that the trial court has adjudged disputed factual contentions, the appellate court is bound by its implied findings in favor of the prevailing party. (Griffith Co. v. San Diego College for Women, 45 Cal. 2d 501, 507-508 [289 P. 2d 476, 47 A. L. R. 2d 1349].)

K. G. is not formally qualified to do business in California. It does not have employees, inventory, bank accounts, or offices here. The activities in this state which appellant relies upon to establish the doing of business are narrated below with our comments about them as they are given in sequence, so that repetition of facts may be minimized.

K. G. manufactures, among other products, a plant for the tempering of shock-resistant glass of the kind used in patio and shower-stall doors. Agalite, being interested in such a plant, came into contact with Burke, who told Agalite's president, Casebolt, that Burke was the exclusive representative in the United States for K. G. and that Casebolt must deal with him. Thus, Agalite had to deal with Burke in California. Burke's statement is supported by evidence. Harald Stenfeldt Hansen, subdirector of K. G., conceded that there was an agreement whereby K. G. would not sell a plant to anybody in the United States but Burke. Moreover, Burke had advertised, with K. G. 's authorization. An advertisement in Glass Digest, a nationwide trade publication, says: "The M. L. BURKE COMPANY is the exclusive U. S. representative for K. G. Ltd., of Denmark, world leaders in the manufacturing of glass tempering plants." Copy of this had been supplied to K. G. The advertisement says, further : "Our fully trained engineering department supervises the complete design and installation of K. G. plants and fully trains your personnel in all phases of the tempering operation." Thus, it was made known to the public in California and elsewhere that Burke, exclusive representative of K. G., would take

an active part in commencing the operation of any plant sold. It is not contended by Agalite that its contact with Burke was brought about by the advertisement. But the publication is evidence that Burke was recognized as K. G. 's exclusive representative, as Burke told Casebolt he was, and it is also evidence of activity in California, to the extent that the advertising was circulated in this state.

In April 1964, K. G. delivered to Burke an agreement stating that the Burke Company was appointed representative for K. G. tempering plants, authorizing Burke to advertise the plants, and agreeing to refer all inquiries about them to Burke. In August 1964, the agreement was extended to July 1968.

In 1962, K. G. and Burke made an agreement whereby Burke would purchase a tempering plant. K. G. set forth particular warranties in the contract and agreed to send an English-speaking specialist to help. In March 1964, this contract was assigned by Burke to Agalite. The agreement between Burke and Agalite provided that Burke would supply his "know-how" in the installation of the plant and would supply the services (to be paid for by Agalite) of a Danish expert, as K. G. had agreed with Burke to do. K. G. gave the name of an expert, Riisberg, who had formerly worked for K. G. The agreement between Agalite and Burke bound the former "to show the tempering machine while it is in operation to prospective customers of K. G. Limited of Denmark."

Casebolt and Burke went to Copenhagen and observed testing of the plant. Arrangements were made for shipping. The K. G. contract with Burke describes delivery as "f. o. b. Copenhagen." The price from K. G. to Burke was $32, 800; that from Burke to Agalite, $82, 800.

Despite the mass of evidence which has been presented, it is not clear whether the sale at Copenhagen must be regarded as one from K. G. to Burke, or K. G. to Agalite, or K. G. to both. K. G. in later correspondence refers to the sale as for Burke's account; but K. G. directly invoiced Agalite for the whole of the balance due, referring to "Your order of April 4th by Mr. M. Burke/M. L. Burke Comp. of Union City, Calif. U. S. A." No doubt this subject will be a relevant one at trial, as will the subject of what warranties were given, and to whom: to Burke, to Agalite, or to both.

But the complete resolution of whatever problems these matters present is not for us now; it is sufficient for us to see what contacts with California appear. Although it seems that title passed from K. G. at Copenhagen, there was a certain residuary interest following the plant into this state. The invoice refers to insurance which Agalite was to pay for in favor of K. G., during the shipping. It was further agreed that a letter of credit in amount $10, 000, the balance of K. G. 's purchase price, would be opened with a bank in San Francisco. The letter of credit was to be cashed by K. G. when "[n]otice that the plant is operating and can produce

tempering glass according to American Tempering Association's specification for warpage, bow, etc." was signed by Riisberg or by Burke or by Hansen.[1] This required work and testing which could be done only in California before certification and final payment.

This brings us to Riisberg. He was an employee of Burke for the purpose of assisting in the commencement of the operation of the plant in Oakland. But Burke in turn was K. G.'s representative for sales. The work which Riisberg would do in California would, if successful, be helpful to K. G., not only in making possible the final payment on this particular sale, but also in providing a showpiece for prospective customers. Even before the assignment of the Burke contract to Agalite, K. G. had written: "We are quite aware of the fact that further orders might result as soon as the actual Plant is installed." The delegation by K. G. to Riisberg to certify the operational competency of the plant is also to be considered. It is to be noted that he kept reporting to K. G. during his stay in Oakland, and receiving advice from K. G. Whether Riisberg was an agent of K. G. in the full sense of the word, it is not necessary to decide at this point. He was an instrument for certain purposes of K. G. in California, and was,

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[1] The condition referred to in the notice corresponds with one of the main warranties in the original K. G. Burke contract.

therefore, one of the "contacts" of the corporation with this state.

Riisberg did not certify the plant to be satisfactory. Harald Hansen did so, from Copenhagen, representing to the bank in San Francisco that the plant is operating and can produce glass according to American Tempering Association's standards; and the payment on the letter of credit was made to K. G. Indeed, Riisberg had grave misgivings, and had noted in his diary that he agreed with Casebolt that the layout did not work; that they had tried everything and had achieved nothing; that he had promised he would ask Harald Stenfeldt Hansen to come right away.

We come now to the visit of K. G. 's Harald Stenfeldt Hansen to California. This subject may be considered under two aspects: 1) whether "trickery" was used by Agalite and, perhaps, by Burke, too, to bring Hansen into this state, and, if so, what effect this would have on the case; and 2) what activities Hansen did engage in while he was here.

About a week after Mr. Hansen arrived in Oakland, the present action was filed and summons was served on him. It appears that the complaint was prepared before his arrival. Respondent argues from these facts and from the fact that Casebolt and Burke had urged K. G. to send someone to California to supervise the operation, that the requested supervision was merely a pretext for inducing an officer of K. G. to come here so that he might be served

with process. The process, therefore, argues respondent (citing Bowes v. Superior Court, (Cal. App.) 124 P. 2d 667; [2] 42 Am. Jur., Process, §§35-37, pp. 32-34), was invalid. But even if this were so, it would not affect the complete service of process for there was a subsequent service on the Secretary of State of California, under order of court pursuant to section 6501 of the Corporations Code. The real question, therefore, is not whether service of summons was accomplished properly, but whether K. G. was doing business in this state, which would justify procedure under section 6501.

Respondent takes a second position on this subject, namely, that Hansen was beguiled into visiting California so that whatever activities he participated in would be used as evidence of doing business. Appellant declares that this point was not made before the trial judge, and we find, by examining the transcript of the argument and by reading the briefs which were presented to the judge, that this is so: the argument of subterfuge was made as to service of process only.

Anyway, the point would be of no avail. It is true that Burke and Casebolt exhorted K. G.

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[2] In the Bowes case, hearing was granted by the Supreme Court and the cause was subsequently dismissed. The case, therefore, is no authority at all. (Ponce v. Marr, 47 Cal. 2d 159 [301 P. 2d 837].)

to send an officer competent to rectify the defects with the plant. But it must be remembered that Burke was the representative of K. G. and that Harald Hansen testified, at his deposition, that even after he had come here, if someone had inquired about the purchase of a tempering plant, Hansen would have referred him to Burke. Burke himself was in danger of being sued on the guaranties he had given to Agalite and, in fact, was sued in this same action which names K. G. a defendant. Even if we infer that the trial judge believed, though the point was not argued to him, that Burke and Casebolt induced Hansen to come to California in order to make a showing of "contacts," we should still have to find that Hansen did participate in the activities described herein. His presence was not of the mere passive kind which might be utilized for service of process. He undertook to rectify the defects with the Agalite plant. This is an element to be considered along with the others. (See Longines-Wittnaur Watch Co. v. Barnes & Reinecke, Inc., 15 N. Y. 2d 443 [261 N. Y. S. 2d 8, 209 N. E. 2d 68]; 20 A. L. R. 3d 1254.) Hansen said, in a declaration, that the defects were caused by Agalite but that he had made the corrections, with the result that the plant operated in an entirely satisfactory manner. He personally delivered certain parts for the use of the plant in Oakland and invoiced Agalite therefor. He was present while demonstrations of the Agalite plant were made by Burke to prospective customers. He visited the plant of Armour Glass Company in Los Angeles, the owners of which were considered by Burke

to be prospects.

[4] Summing up the activities of K. G. within this state, we find the following:

1. Burke, a Californian, was K. G.'s exclusive representative. Many letters, which are exhibits, were sent by Burke to K. G., describing prospects for sales in this state. It is true that although other sales than Agalite's were not made, this may have been because of the deficiencies with the Agalite plant which, it is shown from the beginning of the correspondence between Agalite and Burke, was intended to be a showpiece. When we consider that the plant was high-priced and evidently an intricate one, and that not more than 47 of such plants had been sold throughout the world, we conclude that under the circumstances K. G. got the same advantages as it would have had by use of a salesman within the state. (Eclispe Fuel etc. Co. v. Superior Court, 148 Cal. App. 2d 736 [30 P. 2d 739].)

2. Although title seems to have passed in Copenhagen, it was contemplated by the parties that the successful operation of the plant would be accomplished in California before final payment would be made. Riisberg, who had close contacts with K. G., was sent originally in this connection and Harald Hansen, the very inventor of the device, came later.

3. K. G. continually evinced interest in future sales in California and understood that these were related to the Agalite operation.

Considering all of the circumstances, we find a doing of business although but a single completed sale is involved. (See McGee v. International Life Ins. Co., 355 U. S. 220 [2 L. Ed. 2d 223, 78 S. Ct. 199].)

4. Whether the guaranties made by K. G. ran to Agalite or to Burke only, they gave rise to litigation between Agalite and Burke. Agalite's complaint against Burke was followed by a cross-complaint by Burke against Agalite, in which Burke complains that Agalite has breached its agreement by refusing Burke to show the tempering machine while it is in operation to prospective customers of K. G., causing a loss of prospective sales.

It has been held that an important element in deciding products liability cases is that of the foreseeability of the events which give rise to the lawsuit. (Waco-Porter Corp. v. Superior Court, 211 Cal. App. 2d 559, 566 [27 Cal. Rptr. 31]; Buckeye Boiler Co. v. Superior Court, [a]269 Cal. App. 2d ___. ___[___ Cal. Rptr. ___].) In this case of a sale, a lawsuit ought to have been quite foreseeable to the seller; that is, that a failure of the plant, which required specialized supervision abroad for the commencement of its operation, might produce litigation in the place where any failure would occur. This could only be in California. Whether warranties ran to Burke, to Agalite or to both, they would be breached, if at all,

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[a]Advance Report Citation: 269 A. C. A. 129 135.

in this state.

We conclude that K. G. was doing business in this state within the meaning of the principle that the essence of doing business is that the corporation is present within the state sufficiently to constitute it just and equitable that the corporation be amenable to process within the state. (Long v. Mishicot Modern Dairy, Inc., 252 Cal. App. 2d 425, 428 [60 Cal. Rptr. 432]; Empire Steel Corp. v. Superior Court, 56 Cal. 2d 823, 829 [17 Cal. Rptr. 150, 366 P. 2d 502]; Fisher Governor Co. v. Superior Court, 53 Cal. 2d 222, 224 [1 Cal. Rptr. 1, 347 P. 2d 1]; Cosper v. Smith & Wesson Arms Co., 53 Cal. 2d 77, 82 [346 P. 2d 409]; Carl F. W. Borgward, G. M. B. H. v. Superior Court, 51 Cal. 2d 72, 75 [330 P. 2d 789]; Henry R. Jahn & Son v. Superior Court, 49 Cal. 2d 855, 858 [323 P. 2d 437].) Whatever limits the "doing business" requirement imposes is equivalent to that of the due process clause. (Fisher Governor Co. v. Superior Court, supra; Henry R. Jahn & Son v. Superior Court, supra; Cosper v. Smith & Wesson Arms Co., supra.)

[5] There is a cognate principle to be considered, namely whether a greater amount of justice is afforded to the parties by allowing suit in this state rather than requiring it elsewhere. (International Shoe Co. v. Washington, 326 U. S. 310 [90 L. Ed. 95, 66 S. Ct. 154, 161 A. L. R. 1057].) We proceed to use the tests set forth in Fisher Governor Co. v. Superior Court, supra, at pages 225-226:

1. This state is interested in providing a forum for its resident, Agalite.

2. As to the availability of evidence, the plant itself is here, as are Casebolt and his employees, and Burke. It is impossible for us to say that a larger number of witnesses or a greater quantum of evidence would have to be brought from Denmark.

3. As to ease of access to an alternative forum, there is, of course, no other choice but California or Denmark. Neither is convenient to both parties.

4. Because of the action by Agalite against Burke and Burke's action against Agalite, it appears that the better choice for avoiding multiplicity of suits is to require K. G., since it is determined that it is doing business in this state, to defend the action here. We are not impressed by respondent's argument that Agalite can gain satisfaction, if it is entitled to any, by a judgment against Burke alone, for Burke is solvent. One or two or more potential defendants, if sued alone, usually will put forth every effort at trial to shift responsibility to the absent one. Besides, there is the problem of determining the character of witnesses -- whether they are to be deemed adverse or not.

5. The cause of action arose in large part by K. G.'s local activities directly and through Burke.

The order quashing service of summons is reversed.

Rattigan, J., and Christian, J., concurred.

Agalite-Bronson Company v. K. G. Ltd., 270 A. C. A. 339;

BEATY v. M.S. STEEL COMPANY
Cite as 276 F. Supp. 259 (1967)

Melvin F. BEATY, to his own use and to the use of United States Fidelity and Guaranty Company

v.

M. S. STEEL COMPANY, Inc.

Raymond A. GRAINGER, to his own use and to the use of United States Fidelity and Guaranty Company

v.

M. S. STEEL COMPANY, Inc.

Civ. Nos. 18001, 18002

United States District Court
D. Maryland.
Dec. 5, 1967.

Actions against allegedly negligent Alabama manufacturer of fabricated bar joists which collapsed, while being installed at a construction site in Maryland, resulting in injury to iron workers. The District Court, Harvey, J., held that Maryland "long-arm" statute did not confer personal jurisdiction over manufacturer, where contract of purchase was arranged by a jobber in Massachusetts by means of a telephone call, and joists were shipped prepaid from Alabama to a construction company at jobsite, and there was no showing that manufacturer had over a period of years sold other products to purchasers in Maryland, or that any delivery of joists had

been made by manufacturer itself in Maryland, or that any of its employees supervised installation or delivery of joists.

Cases transferred.

Courts 12(2)

Maryland "long-arm" statute did not confer personal jurisdiction over allegedly negligent Alabama manufacturer of fabricated bar joists which collapsed, while being installed at a construction site in Maryland, resulting in injury to iron workers, where contract of purchase was arranged by a jobber in Massachusetts by means of a telephone call, and joists were shipped prepaid from Alabama to a construction company at jobsite, and there was no showing that manufacturer had over a period of years sold other products to purchasers in Maryland, or that any delivery of joists had been made by manufacturer itself in Maryland, or that any delivery of joists had been made by manufacturer itself in Maryland, or that any of its employees supervised installation or delivery of joists. Code Md. 1957, art. 75, §96.

Sidney Blum and William H. Hicks, Baltimore, Md., for plaintiffs.

Patrick A. O'Doherty, Baltimore, Md., for defendant.

HARVEY, District Judge:

In Hardy v. Rekab, Inc., D.C., 266 F. Supp. 508 (D. Md. 1967), Judge Kaufman, pursuant to the provisions of Rule 4(e) of the Federal Rules of Civil Procedure and the Maryland "long arm" statute, §96, Art. 75, Maryland Annotated Code (1965 Repl. Vol.), [1]

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1. Portions of that statute pertinent to the pending cases read as follows:

"§96(a) A court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a cause of action arising from the person's

(1) transacting any business in this State;

* * *

(3) causing tortious injury in this State by an act or omission in this State;

(4) causing tortious injury in this State by an act or omission outside the State if he regularly does or solicits business, engages in any other persistent course of conduct in this State or derives substantial revenue from food or services used or consumed in this State;

(5) having an interest in, using, or possessing real property in this State;
* * *."

upheld this Court's diversity jurisdiction over an Oregon manufacturer which sold an amusement ride within the state of Maryland. The pending two cases involve the applicability of the same Maryland statute to a foreign manufacturer of fabricated bar joists being installed at a construction site at Sparrows Point, Maryland.

The plaintiff in the Hardy case was a minor child who sought damages from both the owner of a Maryland amusement park and the Oregon manufacturer for personal injuries sustained as the result of a ride on an amusement concession known as a "Paratrooper." As to the Oregon manufacturer, the complaint charged in six separate counts various acts of negligence, breach of warranty and strict liability. Allegations in two of the counts that the foreign manufacturer assembled, repaired and serviced the ride were found by this Court sufficient to support jurisdiction under § 96(a) (3) of Article 75. Jurisdiction of the other four counts was upheld under § 96(a)(1), in view of affidavits filed in the case indicating that the foreign manufacturer during the period from 1957 to 1963 had sold five amusement devices for use in Maryland, that in at least two instances delivery was made in Maryland partially by such manufacturer, and that in at least one instance a representative or employee of such manufacturer supervised the installation in Maryland. This Court further held that jurisdiction over this foreign manufacturer existed with regard to three of these counts and perhaps also as to the fourth under § 96(a) (3) or

§ 96(a) (4) or both.

In the pending cases, both plaintiffs were employed as iron workers by Bernaby Steel Company. Both allege that while working on fabricated bar joists on the premises of the Bethlehem Steel Company at Sparrows Point, Maryland, the joists collapsed, and the plaintiffs fell to the ground suffering disabling injuries. It is further alleged in each case that the defendant, a manufacturer of steel located in Fort Payne, Alabama, negligently manufactured the bar joists and that such negligence caused the injuries sustained by the two plaintiffs, entitling them to substantial damages. In both cases, service of process was made upon the State Department of Assessments and Taxation.

Motions to dismiss have been filed on behalf of the defendant in both cases together with affidavits executed by its President. It is stated in the affidavits that the defendant is an Alabama corporation not licensed to do business in the state of Maryland, that the company did not prior to the date of the accident transact business within the state nor has such business been transacted since, and that the bar joists in question were contracted for by telephone by a jobber in Boston, Massachusetts, were consigned to Brown and Matthews Construction Company, Sparrows Point, Maryland, and were shipped prepaid from Fort Payne, Alabama. At the hearing on such motions, the plaintiffs requested and were granted permission to file in opposition to these affidavits of

the defendant corporation counter-affidavits relating to contacts that such defendant had with the state of Maryland. No such affidavits were filed within the time allowed, but instead plaintiff submitted a memorandum urging that under Gray v. American Radiator and Sanitary Corp., 22 Ill. 2d 432, 176 N. E. 2d 761 (1961), this Court on the record presently before it has jurisdiction in both cases.

In the Gray case, an Illinois resident, claiming negligent manufacture, sued an Ohio corporation to recover for injuries sustained as a result of the explosion in Illinois of a water heater. The defendant corporation had manufactured a safety valve in Ohio and had sold it to a firm in Pennsylvania where the heater itself had been assembled for eventual sale in Illinois. Finding that under the applicable jurisdictional statute the tort was committed in Illinois, the Supreme Court of Illinois upheld jurisdiction over the Ohio defendant. [2]

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2. Before the Gray decision was handed down, the Federal Courts in Illinois had reached a contrary conclusion, holding that the statute did not sanction jurisdiction over a foreign manufacturer whose wrongful act outside the state caused an injury within the state. Hellriegel v. Sears Roebuck & Co., 157 F. Supp. 718 (N. D. Ill. 1957); Trippe Mfg. Co. v. Spencer Gifts, 270 F. 2d 821, 823 (7th Cir. 1959); Insull v. New York World-Tel. Corp., 273 F. 2d 166, 171 (7th Cir. 1959).

If the Maryland "long arm" statute were identical with that of Illinois and if the Gray decision were the law of Maryland, undoubtedly this Court would have jurisdiction ever the foreign manufacturer named as defendant in these two cases. However, § 96 of Article 75 differs in several important respects from the Illinois statute. Furthermore, the Maryland Court of Appeals has not had occasion to decide if it would follow the Gray case in construing the subsections of the Maryland enactment involved here.

Three recent Maryland cases have considered jurisdictional questions arising under § 96 of Article 75 or related statutes. In Gilliam v. Moog Industries, Inc., ___ Md. 107, 210 A. 2d 390 (1965), the Court did not decide whether there was jurisdiction under the new Maryland "long arm" statute (effective June 1, 1954) because the question had not been properly presented to and decided by the trial court. However, the Court did quote § 96(a) in its entirety and made the following comment at page 111, 210 A. 2d at page 392:

> "It seems clear that the purpose of the Legislature in enacting these new provisions was to give the courts of the State personal jurisdiction over all out of state persons and corporations which constitutionally could be reached as having had sufficient Maryland contacts, under the jurisdictional yardstick established by the Supreme Court in cases such as International Shoe Co. v. State

of Washington, 326 U. S. 310, ___ S. Ct. 154, 90 L. Ed. 95; McGee v. International Life Ins. Co., 355 U. S. ___, 78 S. Ct. 199, 2 L. Ed. 2d 223; and Hanson v. Denckla, 357 U. S. 235, 78 S. Ct. 1228, 2 L. Ed. 2d 1283."

In Van Wagenberg v. Van Wagenberg, ___ Md. 154, 215 A. 2d 812 (1966), the Court considered whether the term "transacts any business within the state" in the New York "long arm" statute applied to the doing by a husband in a marital dispute of certain acts in New York, including the execution of a separation agreement. In construing the New York statute, the Maryland Court of Appeals relied upon the decision of the New York Court of Appeals in Feathers v. McLucas, 15 N. Y. 2d 443, 261 N. Y. S. 2d 8, 209 N. E. 2d 68 (1965). In that case, the plaintiffs had brought a tort action for injuries sustained as a result of an explosion in New York of a tank manufactured by a foreign corporation in Kansas. The Court held that the New York statute conferring personal jurisdiction over a non-domiciliary committing a tortious act within the state did not include the commission of a tortious act without the state which caused injury within it and expressly declined to follow the Gray case. In discussing the constitutionality of the New York statute, the Maryland Court discussed and applied the test of International Shoe Co. v. Washington, 326 U. S. 310, 66 S. Ct. 154, 90 L. Ed. 95 (1945) in finding that the husband's contacts with New York were sufficient.

Novack v. National Hot Rod Association, 247 Md. 350, 231 A. 2d 22 (1967) upheld Maryland jurisdiction under § 96 of Article 75 over a California non-profit corporation which sponsored and operated automobile drag races within the state. The Court found that the foreign defendant transacted business in Maryland within the meaning of subsection (a) (1) when its regularly employed agent inspected the Maryland track and certified it as in accord with the national association's standards. It further found that the foreign defendant engaged in a persistent course of conduct in Maryland under subsection (a) (4) in sending its agent into the state on five occasions within the period of little more than a year to inspect and certify the track.

The particular portions of the statute relied upon by the plaintiffs in these two cases are subsections (a) (1), (a) (3), (a) (4) and (a) (5) of § 96, Article 75.[3] Subsection (a) (1) relates to jurisdiction as to a cause of action arising from a foreign corporation's "transacting any business in this State".[4] Clearly,

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3. A comprehensive analysis of the various subsections of §96, Article 75 may be found in Auerbach, The "Long Arm" Comes to Maryland, 26 Md. L. Rev. 13, 31-46 (1966)

4. Under § 94, the word "person" in § 96 includes a corporation or other entity whether or not a citizen or domiciliary of Maryland and whether or not organized under the laws of the state of Maryland.

the defendant in these cases was not transacting any business in the state of Maryland at the time of the injuries sustained by the plaintiffs. Unlike Hardy v. Rekab, Inc., supra, there are no allegations or affidavits indicating that the foreign manufacturer has over a period of years sold other products to purchasers in Maryland, or that any delivery of the building materials in question was made by the foreign manufacturer itself in Maryland, or that any of its employees supervised installation or delivery of such materials. The affidavits in the pending cases establish that the contract of purchase was arranged by a jobber in Massachusetts by means of a telephone call and that the products in question were shipped prepaid from Alabama to the construction company at the job site. Although the factual requirements for "transacting business" are undoubtedly less than those for "doing business", the mere shipment of a product into Maryland under the circumstances of these cases does not satisfy the test established by subsection (a) (1).

Subsection (a) (5) is similarly inapplicable. It confers jurisdiction as to a cause of action arising from a foreign corporation's "having an interest in, using, or possessing real property in this State". The sale by a foreign manufacturer of materials through a foreign jobber to a contractor engaged in building operations in Maryland hardly gives the manufacturer such an interest in the underlying real estate involved as to be subject to suit with the state under subsection (a) (5).

Subsections (a) (3) and (a) (4) are the portions of the statute most pertinent here. Subsection (a) (3) provides for jurisdiction as to a cause of action arising from a foreign corporation's "causing tortious injury in this State by an act or omission in this State" (Emphasis added). Subsection (a) (4) provides for jurisdiction as to a cause of action arising from a foreign corporation's "causing tortious injury in this State by an act or omission outside the State if he regularly does or solicits business, engages in any other persistent course of conduct in this State or derives substantial revenue from food or services used or consumed in this State" (Emphasis added). The Illinois statute involved in the Gray case provided for jurisdiction as to any cause of action arising from the "commission of a tortious act within this State". Ill. Stat. Ann. c. 110, § 17(1) (b). In Gray, the court held that the alleged negligence in manufacturing the valve in question could not be separated from the resulting injury and that since the place of a wrong is where the last event takes place which is necessary to render the actor liable, the tort therefore was committed in Illinois. [5]

In enacting both subsections (a) (3) and (a) (4), the Maryland Legislature carefully distinguished between tortious injury caused by an act in this State and tortious injury caused

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5. This argument was termed "unconvincing" by the New York Court of Appeals in Feathers v. McLucas, supra.

by an act in this State and tortious injury caused by an act outside the State. As to the latter, one of three requirements must be satisfied if there is to be jurisdiction, namely, regularly doing or soliciting business, or engaging in any other persistent course of conduct, or deriving substantial revenue from food or services used or consumed in the State. The Illinois statute contains no counterpart to subsection (a) (4) of the Maryland statute. It was therefore not necessary for the court in the Gray case to find that the absent defendant satisfied one of the three requirements set forth in the Maryland statute.

The Maryland statute is based on Article 1 of the Uniform Interstate and International Procedure Act. 9B U. L. A. 307-315 (1955 Ed.). In particular, § 96 (a) of the Maryland enactment is derived from §1. 03(a) of the Uniform Act. [6] The Commissioner's Note observes that subsection (a) (3) may have a narrower range than statutes such as that in Illinois which base jurisdiction upon the "commission of a tortious act" within the state. 9B U. L. A. 312 (1966 Ed.). As to subsection (a) (4), the Note states that the "Rule is more restrictive than the Illinois statutes, as interpreted in Gray v. American Radiator & Standard Sanitary Corp., [22 A. 2d 432, 176 N. E. 2d 761] * * * ".

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6. Subsections (a) (3) and (a) (4) of the Uniform Act provide for jurisdiction over a person as to a cause of action arising from the person's (illegible)

Although the Maryland statute follows the Uniform Act in substantial part, it in turn is slightly more restrictive than the Uniform Act. The third requirement of subsection (a) (4) of the Maryland enactment covers the deriving of substantial revenue "from food or services used or consumed in this State" while the Uniform Act includes the deriving of such revenue from "goods used or consumed or services rendered in the state." In other words, even if the record in a particular case did indicate that the non-resident defendant derived substantial revenue from steel products used in Maryland, such facts would not satisfy this third requirement of subsection (a) (4) and thereby give the Maryland courts jurisdiction over such foreign manufacturer.

In the opinion of this Court, subsection (a) (3) has no application to the pending two cases, inasmuch as the acts of negligence alleged did not occur in this state. Furthermore, the facts here do not satisfy any one of the three requirements of subsection (a) (4). The defendant in these cases was not regularly doing or soliciting business in Maryland nor was it engaging in any other persistent course of conduct in this state. As a manufacturer of steel products, this non-resident defendant did not derive revenue from food or services used or consumed in Maryland.

Furthermore, although the precise question has not as yet been presented to the state or Federal courts in Maryland, this Court concludes that the Gray case would not be

followed by the Maryland Court of Appeals. It would offend traditional notions of fair play and substantial justice to hold that a non-resident corporation could be used in Maryland merely because on one occasion its product manufactured in another state was shipped into and used within this state. As the Supreme Court said in Hanson v. Denckla, 357 U. S. 235 (1958) at page 253, 78 S. Ct. 1228, 1240, 2 L. Ed. 2d 1283:

> "The unilateral activity of those who claim some relationship with a non-resident defendant cannot satisfy the requirement of contact with the forum State. The application of that rule will vary with the quality and nature of the defendant's activity, but it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws."

In Erlanger Mills v. Cohoes Fibre Mills, 239 F. 2d 502 (4th Cir. 1956), the United States Court of Appeals for the Fourth Circuit considered the jurisdictional power of the state of North Carolina to subject a foreign corporation to the processes of its courts. The statute in question gave the North Carolina courts jurisdiction over foreign corporations not transacting business in the state on any cause of action arising out of the production, manufacture or distribution of goods by such

corporation with the reasonable expectation that those goods were to be used in the state and were so used, regardless of how or where the goods were produced, manufactured or sold, or whether or not through the medium of independent contractors or dealers. A North Carolina purchaser of yarn sought to sue the New York manufacturer in the District Court in North Carolina. The contract was made in New York with the understanding that the yarn would be used in the plaintiff's North Carolina plant and the goods were shipped f. o. b. New York. The Court said that the question for determination was whether the statute might validly subject the foreign manufacturer to the jurisdiction of North Carolina for a single sale consummated in New York with the reasonable expectation that the goods would be used in North Carolina and where the goods were so used and consumed. In finding that the defendant had insufficient contacts with the forum state to satisfy the requirements of due process and in holding the North Carolina statute invalid as applied, Judge Sobeloff said the following at page 507:

> "The orderly and fair administration of the laws throughout the nation is a highly important factor to consider. Davis v. Farmers' Cooperative Equity Co., 262 U.S. 312, 43 S.Ct. 556, 67 L.Ed. 996; International Shoe Co. v. State of Washington, supra, 326 U.S. [310] at page 319, 66 S.Ct. [54] at page 159, [90 L.Ed. 95]. We cannot shut our eyes to the disorder and

unfairness likely to follow from sustaining jurisdiction in a case like this. It might require corporations from coast to coast having the most indirect, casual and tenuous connection with a State to answer frivolous law suits in its courts. To permit this could seriously impair the guarantees which due process seeks to secure."

That a somewhat different rule has been followed by Federal courts in this Circuit from that laid down in the Gray decision was recognized by the Supreme Court of Illinois in its opinion in that case. At page 767 of 176 N. E. 2d, the Court, said the following:

"We are aware of decisions, cited by defendant, wherein the opposite result was reached on somewhat similar factual situations: See Erlanger Mills, Inc. v. Cohoes Fibre Mills, Inc., 4 Cir., 239 F. 2d 502; Hellriegel v. Sears Roebuck & Co., D. C. N. D. Ill. E. D., 157 F. Supp. 718; Johns v. Bay State Abrasive Products Co., D. C. D. Md., 89 F. Supp. 654. Little purpose can be served, however, by discussing such cases in detail, since the existence of sufficient 'contact' depends upon the particular facts in each case. In any event we think the better rule supports jurisdiction in cases of the present kind."

For the reasons stated, it is concluded that these two actions cannot be maintained in

This Court. The plaintiffs have requested in the alternative that instead of dismissing the complaints, this Court should invoke the provisions of 28 U. S. C. A. § 1406(a) and transfer these cases to the appropriate District Court in Alabama. The defendants have not opposed such request. Counsel will therefore prepare and submit within five days appropriate orders for transfer pursuant to the provisions of 28 U. S. C. A. § 1406(a).

Beatty v. M. S. Steel Company,
276 F. Supp. 259.

[Civ. No. 33337. Second Dist., Div. Three. Jan. 24, 1969.]

THE BUCKEYE BOILER COMPANY, Petitioner, v. THE SUPERIOR COURT OF LOS ANGELES COUNTY, Respondent; WAYMAN P. FLYNT, Real Party in Interest.

[1] Process -- Service on Foreign Corporation -- Service Upon Secretary of State. -- In a personal injury action against a foreign corporation which conducted no sales directed at California consumers and had only one customer in the state, the validity of service of process by delivery to the Secretary of State under Code Civ. Proc., §411, subd. 2, depended on whether, under the circumstances, defendant could reasonably have foreseen that it might be sued in California on a cause of action that did not arise out of a use of its product by its sole California customer.

[2] Id. -- Service on Foreign Corporation -- Service Upon Secretaty of State. -- The foreseeability of suit requisite to the validity of service of process on a foreign corporation by delivery to the Secretary of State under Code Civ. Proc., §411, subd. 2, is present when the action is for personal

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[1] See Cal. Jur. 2d, Foreign Corporations, §63; Am. Jur. 2d, Foreign Corporations, §467.
McK. Dig. References: [1-3] Process, §57(2); [4] Corporations, §900.

injury arising out of the use of the defendant corporation's product in California and when the defendant has regularly solicited and made sales in California, and, even if the defendant corporation has conducted no sales effort directed at California consumers, it may be fair to hold it subject to the jurisdiction of this state where a suit arising out of other limited activity California is reasonably foreseeable, but the requisite foreseeability is not present where there is no showing that the defendant corporation conducted a sales effort directed either generally to all states or specifically to California, or that it had other contacts in California.

[3] Id. -- Service on Foreign Corporation -- Service Upon Secretary of State. -- In an action for personal injuries sustained by plaintiff in the course of his employment when a pressure tank used in spraying liquid exploded, allegedly caused by the negligent manufacture of the pressure vessel by defendant foreign corporation, the record did not support a conclusion that defendant should have expected to defend such an action in this state so as to make it amenable to process by delivery to the Secretary of State, where its sales effort in California was confined to direct sales to one specific buyer who purchased defendant's pressure tanks as a component for hydraulic lifts manufactured by it and did not resell the tanks for other uses, where plaintiff's cause of action was unrelated to to the use of a hydraulic lift, and where

there was no substantial showing that plaintiff's employer purchased the tank which caused plaintiff's injury from a source inside California.

[4] Corporations -- Foreign Corporations -- Actions -- Jurisdiction. -- In an action against a foreign corporation and a local defendant for personal injuries arising out of the explosion of a pressure tank, prospective inconvenience to plaintiff if the foreign corporation was not subjected to the jurisdiction of California courts was not of itself a sufficient reason to assume jurisdiction, and in any event the relative availability of evidence and the burden of defense and prosecution on the causes of action against defendant corporation were closely balanced, where the witnesses and records concerning the explosion of the tank, the extent of plaintiff's injury, and his subsequent treatment were in California, but the evidence concerning the defective manufacture of the tank was in Ohio.

PROCEEDING in mandamus to compel the Superior Court of Los Angeles County to enter its order quashing service of summons on a foreign corporation. Peremptory writ granted.

Murchison, Cumming, Baker & Velpman and Ronald R. McQuoid for Petitioner.

No appearance for Respondent.

Margolis & McTernan for Real Party in Interest.

MOSS, J. -- Petitioner, the Buckeye Boiler Company, an Ohio corporation, seeks a writ of mandate to compel the superior court to enter its order quashing service of summons in an action brought by plaintiff, the real party in interest in this proceeding, to recover damages for personal injuries. Petitioner was served by making personal delivery to the Secretary of State, as authorized by section 411, subdivision 2 of the Code of Civil Procedure[1] and section 6501 of the Corporations Code.[2] Petitioner

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[1]Section 411 provides in pertinent part: "The summons must be served by delivering a copy thereof as follows:

2. If the suit is against a foreign corporation, . . . doing business in this State; in the manner provided by Sections 6500 to 6504, inclusive, of the Corporations Code."

[2]Section 6501 of the Corporations Code provides: "If the agent designated for the service of process be a natural person and cannot be found with due diligence at the address stated in the designation or if such agent be a corporation and no person can be found with due diligence to whom the delivery authorized by Section 6500 may be made for the purpose of delivery to such corporate agent, or if the agent designated is no longer authorized to act, or if no agent has been designated and if no one of the officers or agents of the corporation specified in Section 6500 can be found after diligent search and it is so shown by affidavit to the satisfaction of the court or judge, then the court or judge may (continued)

appeared specially (Code Civ. Proc., §416. 3) and moved to quash the service of summons on the ground that it was not doing business in this state. The motion was granted without prejudice to a further application for substitued service by plaintiff supported by a showing of further jurisdictional facts. Substituted service was effected a second time and again petitioner moved to quash service upon the same grounds. The second motion was heard upon affidavits and was denied.

Plaintiff alleges in his second amended complaint that he was injured in the course of his employment in Onatario, California, by the explosion of a pressure tank, used in connection with the spraying of liquid under air pressure, caused by the negligent manufacture of the pressure vessel by petitioner. Plaintiff also joined as a defendant the hospital in which he was treated following the explosion and alleged that he suffered damages caused by negligent treatment which he received at the hospital.

The facts presented in the affidavits and interrogatories filed in support of and in opposition to petitioner's motion to quash are not in dispute. Plaintiff is a resident of California and was regularly employed here at the time of his injury. The witnesses to the accident and the subsequent treatment of plaintiff all reside in California.

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2 (continued) make an order that service be made by personal delivery to the Secretary of State. . . ."

Petitioner has its principal place of business and offices in Dayton, Ohio. Petitioner is engaged in the manufacture of unfired pressure vessels; it does not affix valves or any attachment to the vessels. Petitioner has no agent, office, sales representative, exclusive agency or exclusive sales outlet in California. It does not sell on consignment and has no commission agreement with any person or entity in California. Petitioner maintains no office, warehouse or stock of merchandise or materials in California. Petitioner owns no property in California and has no bank accounts here. Petitioner has qualified to do business in no state other than Ohio and has no salesmen outside of Ohio. Petitioner solicits sales outside the state of Ohio through independent manufacturers' representatives who sell petitioner's products on a commission basis. These representatives are located in Kentucky for the state of Kentucky; In Columbus, Ohio, for the states of Michigan, Indiana, Ohio, Pennsylvania and West Virginia; in Pennsylvania for the states of Pennsylvania, New Jersey, New York, Connecticut, Maryland and Delaware; In North Carolina for the states of Virginia, North Carolina and South Carolina; and in Georgia for the states of Georgia, Florida and Alabama. Petitioner does not and has not advertised. All contacts with customers are made either through manufacturers' representatives or direct contact with the customer by petitioner. For a period of five years prior to the date of plaintiff's injury and continuing to the present, petitioner has sold air pressure reservoir tanks to Cochin Manufacturing Company, an Ohio corporation, which maintains a

manufacturing facility in South San Francisco, California. Cochin orders some tanks directly from its South San Francisco facility; it negotiates the sale of some tanks through its Ohio office. The price of the tanks is $55 to $60 each. Petitioner ships the tanks directly to the Cochin facility in South San Francisco. Cochin manufactures hydraulic automobile lifts for service stations. The tanks purchased from petitioner are integrated into the hydraulic lifts prior to sale by Cochin. Annual gross sales from petitioner to Cochin during the past two or three years have ranged from $25,000 to $35,000. The hydraulic lift devices manufactured by Cochin are distributed to purchasers throughout the state of California and in other states. Cochin pays for merchandise purchased by Cochin from its South San Francisco facility directly to petitioner in Ohio.

Plaintiff's employer, General Electric Company, has never, so far as the records of petitioner and General Electric show, purchased a vessel or anything else from petitioner. It is the normal procedure at the plant at which plaintiff was employed to arrange purchases of needed materials wherever possible from suppliers located within the state of California. Affixed to the pressure vessel, the explosion of which injured plaintiff, was a plate bearing the legend: "The Buckeye Boiler Company, Dayton, Ohio. Built 1960 -- 150 lbs. maximum."

Code of Civil Procedure, section 411, subdivision 2, authorizes service of process on foreign corporations that are "doing business in

this State." The reach of that statute has been stated by the California Supreme Court as follows [internal quotation marks omitted]: "That term is a descriptive one that the courts have equated with such minimum contacts with the state that the maintenance of the suit does not offend traditional notions of fair play and substantial justice. (International Shoe Co. v. Washington, 326 U.S. 310, 316 [66 S. Ct. 154, 90 L. Ed. 95, 161 A. L. R. 1057].) Whatever limitation it imposes is equivalent to that of the due process clause. Doing business within the meaning of section 411 of the Code of Civil Procedure is synonymous with the power of the state to subject foreign corporations to local process." (Fisher Governor Co. v. Superior Court, 53 Cal. 2d 222, 224 [1 Cal. Rptr. 1, 347 P. 2d 1].) The permissible scope of state jurisdiction over foreign corporations and other nonresidents has expanded through the years. "In part this is attributable to the fundamental transformation of our national economy over the years. Today many commercial transactions touch two or more States and may involve parties separated by the full continent. With this increasing nationalization of commerce has come a great increase in the amount of business conducted by mail across state lines. At the same time modern transportation and communication have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity." (McGee v. International Life Ins. Co. (1957) 355 U.S. 220, 222-223 [2 LEd. 2d 223, 226, 78 S. Ct. 199].)

"But it is a mistake to assume that this

trend heralds the eventual demise of all restrictions on the personal jurisdiction of state courts. [Citation] Those restrictions are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective States. However minimal the burden of defending in a foreign tribunal, a defendant may not be called upon to do so unless he has had the 'minimal contacts' with that State that are a prerequisite to its exercise of power over him." (Hanson v. Denckla (1958) 357 U.S. 235, 251 [2 L. Ed. 2d 1283, 78 S. Ct. 1228].) "Although a foreign corporation may have sufficient contacts with a state to justify an assumption of jurisdiction over it to enforce causes of action having no relation to its activities in that state [Citations], more contacts are required for the assumption of such extensive jurisdiction than sales and sales promotion within the state by independent nonexclusive sales representatives. [Citations] To hold otherwise would subject any corporation that promotes the sales of its goods on a nationwide basis to suit anywhere in the United States without regard to other considerations bearing on the fair and orderly administration of the laws which it was the purpose of the due process clause to insure.' " (Fisher Governor Co. v. Superior Court, supra, 53 Cal. 2d 222, 225.)

[1] The foregoing statements of the law indicate that the question before us is whether under the circumstances petitioner could reasonably have foreseen that it might be sued in

California on a cause of action that did not arise out of a use of petitioner's product by Cochin. This view is borne out by the cases. [2] The requisite foreseeability is present where the action is for personal injury arising out of the use of the petitioner's product in California and the foreign corporation has regularly solicited and made sales in California. (Cosper v. Smith & Wesson Arms Co., 53 Cal. 2d 77 [346 P. 2d 409]; H. Liebes & Co. v. Erica Shoes, Inc., 237 Cal. App. 2d 25 [46 Cal. Rptr. 470]; Waco-Porter Corp. v. Superior Court, 211 Cal. App. 2d 559 [27 Cal. Rptr. 371]; Eclipse Fuel etc. Co. v. Superior Court, 148 Cal. App. 2d 736 [307 P. 2d 739]; Duraladd Products Corp. v. Superior Court, 134 Cal. App. 2d 226 [285 P. 2d 699]; See Witkin, Cal. Procedure (1967 Supp.) §88A at p. 170.) In recognition of the fact that today a manufacturer seldom deals directly with consumers in other states, it has been held that if a corporation by its method of distribution "inaugurates a flow of its products to the California market: it is reasonable to hold that manufacturer amenable to substituted service in California where under the circumstances it is foreseeable that the manufacturer's product will be sold to California consumers. (Regie Nationale Des Usines Renault v. Superior Court, 208 Cal. App. 2d 702, 703 [25 Cal. Rptr. 530]; see Gray v. American Radiator & Standard Sanitary Corp., 22 Ill. 2d 432 [176 N. E. 2d 761].) Even if the defendant corporation has conducted no sales effort directed at California consumers it may be fair to hold it subject to the jurisdiction of this state where a suit arising out of other limited activity in California is reasonably

foreseeable. (James R. Twiss, Ltd. v. Superior Court, 215 Cal. App. 2d 247, 252-253 [30 Cal. Rptr. 98] [action for personal injuries sustained while unloading defendant's ship in a California port]; A. R. Industries, Inc. v. Superior Court, [a]268 Cal. App. 2d ___ [___ Cal. Rptr. ___] [personal injury action arising from use of 3. 8-ton buffing machine sold by defendant with knowledge that the machine was to be used in California].) On the other hand, the requisite foreseeability is not present where there is no showing that the defendant corporation conducted a sales effort directed either generally to all states or specifically to California or that it had other contacts with California. (Leach Co. v. Superior Court, [b]266 Cal. App. 2d ___ [72 Cal. Rptr. 216]; Gill v. Surgitool Inc., 256 Cal. App. 2d 583 [64 Cal. Rptr. 207]; DaSilveira v. Westphalia Separator Co., 248 Cal. App. 2d 789, 791-792 [57 Cal. Rptr. 62]; Twinco Sales, Inc. v. Superior Court, 230 Cal. App. 2d 321, 323 [40 Cal. Rptr. 833]; Yeck Manufacturing Corp. v. Superior Court, 202 Cal. App. 2d 645 [21 Cal. Rptr. 51]; Martin Bros. Elec. Co. v. Superior Court, 121 Cal. App. 2d 790 [264 P. 2d 183].)

[3] The record before us does not support the conclusion that petitioner should have expected to defend an action such as this in the

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[a]Advance Report Citation: 268 A. C. A. 344.

[b]Advance Report Citation: 266 A. C. A. 521.

state of California. Petitioner's sales effort in California was confined to direct sales to one specific buyer, Cochin Manufacturing Company. Cochin purchased petitioner's pressure tanks as a component for hydraulic lifts manufactored by Cochin; Cochin did not resell the tanks in California for other uses. Plaintiff's cause of action is unrelated to the use of a hydraulic lift manufactured by Cochin. (Compare A. R. Industries, Inc. v. Superior Court, supra, [c]268 Cal. App. 2d__.) Petitioner had no reason to believe that the pressure tanks which it sold to Cochin would find their way into the hands of other buyers in California except as a component of a hydraulic lift manufactured by Cochin. An inference to the contrary cannot be drawn from the fact that the chief of the purchasing department of the plant at which plaintiff was injured stated in his declaration that it is normal procedure for his department to arrange purchases of needed materials "wherever possible" from suppliers located within the state of California. So far as the record shows it was not possible to purchase petitioner's pressure tanks from any source in California. Therefore, there was no substantial showing that plaintiff's employer purchased the tank which caused plaintiff's injury from a source inside of California.

So far as the record shows the use of petitioner's product in California for a purpose other than as a component of a hydraulic lift manufactured by Cochin is an isolated instance. There is no showing that petitioner marketed its product in such a manner as to give rise to a reasonable inference that petitioner's

[c]Advance Report Citation: 268 A.C.A. 344.

commercial transactions would result in substantial use and consumption of its product in this state. While petitioner maintained a network of independent sales representatives throughout the eastern United States, so far as the record shows petitioner made no attempt to sell its product generally west of the Mississippi River. There is no showing that any of these representatives made sales or conducted sales promotion directed toward California consumers.

The absence of any activity by petitioner to initiate the flow of its products to California other than sales to a specific buyer for a specific use unrelated to this case distinguishes this case from the cases relied upon by the real party in interest. Thus, in Keckler v. Brookwood Country Club (N. D. Ill. 1965) 248 F. Supp. 645, the court stated that "the complaint must affirmatively show that defendant's distribution volume or pattern is of the kind from which a reasonable inference may be drawn that the national channels of commerce have been chosen." (248 V. Supp. at p. 650.) The court granted the petitioner's motion to quash and allowed the plaintiff additional time to amend his complaint to show the necessary jurisdictional facts. Here the plaintiff made no showing to the trial court and does not assert to this court that if given additional time he could allege additional jurisdictional facts. In fact, the present proceeding represents plaintiff's second attempt to state such facts, an earlier motion by petitioner to quash service having been granted without prejudice to the right of plaintiff to make a further application for substituted service upon

a showing of additional jurisdictional facts.

In Gray v. American Radiator & Standard Sanitary Corp., supra, 22 Ill. 2d 432 [176 N. E. 2d 761], the defendant corporation manufactured safety valves in Ohio which it sold to a manufacturer of water heaters in Pennsylvania, which in turn marketed its product in Illinois and other states. The plaintiff was injured when the water heater exploded in Illinois. The court noted that the defendant "does not claim that the present use of its product in Illinois is an isolated instance" and that "it is a reasonable inference that its commercial transactions, like those of other manufacturers, result in substantial use and consumption in this State." (176 N. E. 2d at p. 766.) As we have noted, it is not a reasonable inference from the record in this case that petitioner's commercial transactions result in substantial use and consumption of its product in this state other than as components of hydraulic lifts manufactured by Cochin.

In the other cases relied upon by plaintiff each defendant corporation, unlike petitioner here, had a reason to expect from the nature and volume of its commercial transactions that its product would find its way into the hands of a substantial number of buyers in the forum state. (Atkins v. Jones etc. Steel Corp. 258 Minn. 571 [104 N. W. 2d 888]; Stephenson v. Duriron Co. (Alaska) 401 P. 2d 423; Bullard v. Rhodes Pharmacal Co., Inc. (D. Mont. 1967) 263 F. Supp. 79; See Billmore v. J. S. Inskip, Inc., 54 Misc. 218 [282 N. Y. S. 2d 127].)

[4] Plaintiff argues as a basis for the assumption of jurisdiction in this case that most of the evidence related to the accident and plaintiff's injury and treatment is located in California and that if petitioner is not subjected to the jurisdiction of California courts plaintiff will be greatly inconvenienced by the necessity of prosecuting two actions. These considerations are relevant factors to be considered, he argues, under the rule of Fisher Governor Co. v. Superior Court, supra, 53 Cal. 2d 222, 225-226.[3] We must balance the interest of the forum state and the convenience to plaintiff against the inconvenience to petitioner. As we have explained, by reason of the fact that petitioner's sales activity in this state was limited to sales to one customer only for one specific use by that

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[3] As listed in Fisher, relevant factors are: "The interest of the state in providing a forum for its residents [Citation] or in regulating the business involved [Citations]; the relative availability of evidence and the burden of defense and prosecution in one place rather than another [Citations]; the ease of access to an alternative forum [Citation]; the avoidance of multiplicity of suits and conflicting adjudications [Citations]; and the extent to which the cause of action arose out of defendant's local activities."

customer and the fact that plaintiff's cause of action is unrelated to such use, the case for assumption of jurisdiction over petitioner in this case is weak. While it is true that plaintiff will be inconvenienced if California does not assume jurisdiction over petitioner in this case, plaintiff's inconvenience of itself is of course an insufficient reason to assume jurisdiction, because the prospect of similar inconvenience is always present in these cases. Similarly, the interest of California in protecting its residents from injury caused by defective products cannot of itself justify an assumption of jurisdiction. The relative availability of evidence and the burden of defense and prosecution on the causes of action against petitioner are closely balanced in this case. All the witnesses and records concerning the explosion of the tank, the extent of plaintiff's injury and his subsequent treatment are here, but all of the evidence concerning the defective manufacture of the tank is in Ohio. (See Leach Co. v. Superior Court, supra, [d]266 Cal. App. 2d ___; Twinco Sales, Inc. v. Superior Court, supra, 230 Cal. App. 2d 321; Martin Bros. Elec. Co. v. Superior Court, supra, 121 Cal. App. 2d 790.) Unlike the situation in the Renault case, supra, 208 Cal. App. 2d 702, if California rejects jurisdiction the plaintiff will not be denied access to the courts of all of the states of the union. On the contrary, plaintiff is here seeking

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[d]Advance Report Citation: 266 A. C. A. 521.

a remedy in addition to that afforded by the workmen's compensation laws of this state, against his employer.

Let a peremptory writ of mandate issue as prayed.

Ford, P. J., and Cobey, J., concurred.

Buckeye Boiler Co. v. Superior Court, 269 A. C. A. 129, 137-138;

[L. A. No. 29594. In Bank. Mar. 11, 1969.]

SANDRA LEE ELMORE, Plaintiff and Appellant, v. AMERICAN MOTORS CORPORATION et al., Defendants and Respondents,

[L. A. No. 29595. In Bank. Mar. 11, 1969.]

ANNA MAY WATERS, Plaintiff and Appellant, v. AMERICAN MOTORS CORPORATION et al., Defendants and Respondents.

(Consolidated Actions.)

[On hearing after decision by the Court of Appeal, Second Appellate District, Division Five, Civ. Nos. 32856, 31359 (263 A. C. A. 764, 69 Cal. Rptr. 799) affirming judgment of the superior court. Judgment reversed.]

[1] Nonsuit--When Motion Granted--Rules for Consideration of Evidence: Trial--Direction of Verdict--Condition of Evidence Authorizing. -- A nonsuit in a jury

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[1] See Cal. Jur. 2d, Dismissal and Nonsuit Rev., § 44 et seq.; Am. Jur. 2d, Dismissal, Discontinuance, and Nonsuit, § 4.

McK. Dig. References: [1] Dismissal, Discontinuance, and Nonsuit, § 75(9); Trial, § 257(1)(b); [2, 3] Products Liability, § 56; [4] Products Liability, § 60; [5] Products Liability, §§ 51, 60; [6] Products Liability, § 53; [7, 8] Products Liability, § 50.

case or a directed verdict may be granted only when disregarding conflicting evidence, giving to the plaintiffs' evidence all the value to which it is legally entitled, and indulging every legitimate inference which may be drawn from the evidence in plaintiffs' favor, it can be said that there is no evidence to support a jury verdict in their favor.

[2] Products Liability--Strict Liability in Tort --Persons Liable. -- A manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being.

[3] Id. --Strict Liability in Tort--Persons Liable. --A retailer engaged in the business of distributing automobiles to the public is strictly liable in tort for personal injuries caused by defects in cars sold by it.

[4] Id. --Strict Liability in Tort--Matters of Proof. --The rule that in an action for strict liability against an automobile manufacturer and dealer for injuries allegedly caused by a defect in an automobile, a plaintiff is entitled to establish the existence of the defect and the defendants' responsibility for it by circumstantial evidence applies also where the plaintiff is seeking to prove that the defect caused his injuries.

[5] Id. --Strict Liability in Tort--When Applicable; Requirement Precedent: Matters of Proof. --In consolidated actions by an automobile driver and occupants of another car with which it collided, against an automobile manufacturer and a dealer, for strict liability in tort for injuries and wrongful death allegedly caused by an automobile defect resulting in the purchaser-driver's loss of control, the evidence, viewed most strongly in plaintiffs' favor on motion for nonsuit, furnished an inference that their injuries were proximately caused by an automobile defect existing at the time of sale, where, from expert testimony that the car was defective prior to the accident in that the drive shaft was disconnected, and the effect thereof, and from the physical facts, it could properly be inferred that the disconnected drive shaft gouged the roadway, caused the car to "fishtail" into the path of the oncoming car and proximately cause the accident, where an expert testified that the drive shaft failing would be due either to loose fastenings or metal failure, not anything the driver did, nor normal wear and tear, and where the car had been driven less than 2, 800 miles, and the only servicing by defendant dealer did not involve replacement of the drive shaft, its connecting parts, or any repairs thereto.

[6] Id. --Strict Liability in Tort--Requirements of Privity. --The doctrine of strict liability may not be restricted on a theory of privity

of contract, and since the doctrine applies even where a manufacturer has attempted to limit liability, the doctrine may not be limited so as not to be applicable to third persons who are bystanders and not purchasers or users of the defective chattel on the theory that no representation of safety is made to the bystander.

[7] Id. --Strict Liability in Tort--Injury and Damage to Which Applicable. --An automobile with a defectively connected drive shaft constituted a substantial hazard on the highway, not only to the driver and passenger of the car but also to pedestrians and other drivers, as the public policy which protects the driver and passenger of the car also protects the bystander; and where the driver or passenger of another car was injured due to such defect in the manufacture of an automobile and without any fault of their own, they could recover from the manufacturer of the defective automobile.

[8] Id. --Strict Liability in Tort--Injury and Damage to Which Applicable. --The doctrine of strict liability in tort is available in an action for personal injuries by a bystander against the manufacturer and retailer of a defective product.

APPEAL from a judgment of the Superior Court of Los Angeles County. Stevens Fargo, Judge. Reversed.

Consolidated actions against a car manufacturer for damages for personal injury and wrongful death arising out of an automobile collision allegedly caused by a manufacturing defect existing when the car was sold. Judgment of nonsuit reversed.

James H. Davis and Edward L. Lascher for Plaintiffs and Appellants.

Booth, Mirchel, Strange & Willian, George C. Mitchel, Sweeney, Cozy & Foye, Thomas P. Foye and Raymond A. Cozy for Defendants and Respondents.

Morgan, Wenzel, Lynberg, Stearns & Morris and Wm. Marshall Morgan as Amici Curiae on behalf of Defendants and Respondents.

PETERS, J. --In these consolidated injury and wrongful death actions growing out of an automobile collision, the trial court at the conclusion of the plaintiffs' cases in chief granted motions for nonsuit by defendants American Motors Corporation and Mission Rambler Company and dismissed the jury. Plaintiffs have appealed from the ensuing judgments.

On March 16, 1962, plaintiff Mrs. Sandra Elmore and her husband purchased a 1962 Rambler American station wagon from Mission. The car had a standard transmission. It was not equipped with power steering or power brakes. Mrs. Elmore used the car to commute

to work. The car was serviced by Mission after it had been driven about 1,500 miles. The car was lubricated and the oil and oil filter changed. Subsequently, Mrs. Elmore noticed that the car was shimmying when she drove it between 60 and 65 miles per hour.

She told her husband about the shimmying and asked him to drive the car. He could barely detect the shimmying and did not think it was sufficiently serious to warrant Mrs. Elmore taking time from her work to return the car for servicing. The Rambler had been driven 2,751 miles before the accident.

The accident occurred shortly after noon on April 29, 1962, a bright clear day. Mrs. Elmore was driving in a southerly direction on a three-lane road near Northridge. She suffered head injuries and was unable to remember anything about the day of the accident.

Mr. Hendley testified that he was following the Rambler for about a mile and a half before the collision, that Mrs. Elmore was travelling about 45 miles per hour, that she had caught up with the traffic in front of her and had started to pull out as if to overtake the vehicle in front of her, that a car honked to pass her, and that as she returned to the right hand lane, there was a series of "sparks underneath the car like something fell. . . . like something in front was dragging. . . . like a big hunk of metal suddenly hitting the ground." Hendley stated that the sparks were

"strong" ones, not like the little spark from a dragging chain. He also said that Mrs. Elmore started "fishtailing," that as the "fishtailing" got worse the automobile went over to the wrong side of the road and struck the vehicle of plaintiff Waters, that the "fishtailing" continued until the collision, and that the impact hurled Mrs. Elmore from her vehicle onto the embankment.

A highway patrol officer investigating the accident shortly after the collision found skid and gouge marks on the pavement on the northbound lane. A gouge mark about 300 feet from the point of impact extended for a distance of some feet, although the precise distance from the gouge mark was not stated. Skid marks continued in a northerly direction from the gouge mark for about 164 feet. The same officer had patrolled the area about an hour before the accident and did not observe any skid or gouge marks at that time.

Mr. Snyder, a mechanical engineer and automobile expert, gave his opinion as to the cause of the gouge marks: "Well, a piece of metal of some kind from the subject vehicle came against the roadway and scraped against it or gouged into it hard enough to abrade, gouged the roadway, as shown, in that during that process of gouging the roadway in that manner the metal would act the same as if you had put it against a rather large grindstone and sparks would be thrown off from the gouging of the metal against the roadway. It is an abrasive reaction between the metal and the roadway.

Now, that would continue as long as the piece were rammed or jammed into the roadway. . . . [A] piece of metal which is gouging into the pavement is gouging by virtue of the fact that some portion is jamming it into it. Now, if it wears a little bit . . . the vehicle passes over that, and then from then on it may just drag lightly, but it won't leave a gouge mark if it is just dragging along. It gouged hard, was forced into the pavement up to the end of the mark, then the mechanics of the situation is that the pressure was relieved at that point by one way or another and there is no further gouge mark." He did not examine the Rambler and could not tell which particular part had dropped from it although he mentioned a number of parts which could drop. He further testified that whatever piece of equipment may have come loose was in the forward part of the car.

Mr. Ausburn, a licensed engineer, examined the Waters and Elmore vehicles at a wrecking yard apparently eight days after the accident. He made a general examination of the car. At the time he did not have the benefit of the officer's report of the accident or of Mr. Hendley's statement, and he was not looking for a metallic object that might have dragged on the ground. The front end of the Rambler was badly damaged. The right front wheel was bent and the tire was flat. The intermediate rod was torn loose from the idler arm. Many of the parts associated with the steering mechanism were bent and displaced. After the steering mechanism was removed from the Rambler, Ausburn examined the steering box and found in it small metallic particles and particles of a

piece of plastic impregnated tape which was similar to the plastic tape labelling the worm shaft of the steering gear.

When Ausburn examined the Rambler, the drive shaft, a metal tube about 3 inches in diameter, was not attached in its proper place but was in the rear of the Rambler station wagon. The drive shaft was buckled. When shown a photograph taken by the highway patrol officer a few moments after the accident, he stated that an object on the ground about 25 feet from the vehicle was "probably" the drive shaft from the vehicle.

Ausburn also testified that the drive shaft is attached at the forward and rear portions of the car to universal joints; that if a drive shaft fell down while the car was moving, it would dig into the roadway, make sparks, and cause the rear of the car to lift and to swerve or be thrown around; that normal wear and tear or "anything the driver did" would not cause a drive shaft to fall down in a space of 2,700 miles; that the cause of a drive shaft falling would be either loose fastenings or a metal failure; and that a drive shaft would not ordinarily be expected to become separated from the car in the accident which occurred.

In response to a hypothetical question assuming that there was heavy sparking underneath the Rambler and that immediately thereafter the Rambler went out of control and crossed to the other side of the highway, Ausburn gave his opinion that the cause of the sparking was "an undertermined part dropping down and dragging on the highway."

Ausburn further testified that an experiment

he performed with the gear box indicated that the driver of the car would have to exert extra effort in steering the car to overcome the resistance caused by the presence of the tape in the gearbox.

Ausburn also said that his first examination of the Rambler did not disclose evidence of the existence of mechanical defects prior to the accident. After he examined the gearbox, he concluded that there was a defect before the accident in that a foreign matter apparently was present within the gearbox. At the time of trial, after he had seen the pictures of the scene of the accident and learned of the testimony of the heavy sparking, he was of the opinion that there was a second defect prior to the accident, namely, the disconnected drive shaft.

[1] A nonsuit in a jury case or a directed verdict may be granted only when disregarding conflicting evidence, giving to the plaintiffs' evidence all the value to which it is legally entitled, and indulging every legitimate inference which may be drawn from the evidence in plaintiffs' favor, it can be said that there is no evidence to support a jury verdict in their favor. (Estate of Callahan, 67 Cal. 2d 609, 612 [63 Cal. Rptr. 277, 432 P. 2d 965]; Taylor v. Centennial Bowl, Inc. 65 Cal. 2d 114, 120-121 [52 Cal. Rptr, 416 P. 2d 793]; Estate of Lances, 216 Cal. 397, 400 [14 P. 2d 768].)

[2] "A manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being." (Greenman v. Yuba

Power Products, Inc., 59 Cal. 2d 57, 62 [27 Cal. Rptr. 697, 377 P. 2d897, 13 A. L. R. 3d 1049]; Vandermark v. Ford Motor Co., 61 Cal. 2d 256, 260-261 [37 Cal. Rptr. 896, 391 P. 2d 168].) [3] Similarly, a retailer engaged in the business of distributing automobiles to the public is strictly liable in tort for personal injuries caused by defects in cars sold by it. (Vandermark v. Ford Motor Co., supra, 61 Cal. 2d 256, 263.) [4] In the last-cited case, it was recognized that a plaintiff is entitled to establish the existence of the defect and the defendants' responsibility for it by circumstantial evidence. (61 Cal. 2d at p. 260.) No reason appears why the same rule should not apply where the plaintiff is seeking to prove that the defect caused his injuries.

[5] When the evidence is viewed, as it must be, most strongly in favor of plaintiffs, it furnishes an inference that their injuries were proximately caused by a defect in the Rambler which existed at the time of sale. Ausburn testified that in his opinion the car was defective prior to the accident in that the drive shaft was disconnected, and in the light of his further testimony as to what occurs when the drive shaft becomes disconnected, the presence of the gouge mark, and Mr. Hendley's testimony as to the sparks and the motions of the car prior to the accident, it could properly be inferred that the disconnected drive shaft gouged the roadway and caused the rear of the car to lift and to swerve or be thrown around which in turn caused the Rambler to go to the wrong side of the road. Thus, it could properly be found that the disconnected drive shaft was a proximate cause

of the accident.

Ausburn also testified that the cause of a drive shaft falling would be either loose fastenings or metal failure and would not be "anything the driver did" or normal wear and tear. The car had been driven less that 2,800 miles, and so far as appears, the only servicing of the car, which was by Mission, did not involve replacement of the drive shaft or its connecting parts or any repairs to them. In these circumstances, it is not unreasonable to conclude that the defect in the metal or in the fastenings existed at the time of sale.

Since the plaintiffs thus produced evidence as to the defect which caused the injury and evidence permitting an inference that the defect existed at time of sale, Jakubowski v. Minnesota Min. & Mfg., 42 N.J. 177 [199 A.2d 826, 829-830], relied upon by defendants, is distinguishable. The court there pointed out that its rule that the plaintiff must negate all possible causes for which the defendant was not liable applied in the absence of evidence "which would permit an inference that a dangerous condition existed prior to sale." In that case an abrasive disc broke when used in a normal manner by plaintiff. The disc had been previously used by an employee whom plaintiff had replaced, and the court held that it was as probable that the breaking of the disc was due to a manufacturing flaw as that it was due to mishandling by prior users. In the instant case, there is no evidence that anyone handled the drive shaft after the sale of the Rambler, and the evidence furnishes an inference that a dangerous condition existed prior to sale.

The authors of the restatment have refrained from expressing a view as to whether the doctrine of strict liability of the manufacturer and retailer for defects is applicable to third parties who are bystanders and who are not purchasers or users of the defective chattel. (Rest. 2d Torts, §402A, com. o.) The authors pointed out that as yet (1965) no case had applied strict liability to a person who was not a user or consumer. Two recent cases, however, have held manufacturers of defective goods strictly liable in tort for injuries caused to persons who were mere bystanders and were not users of consumers. (Piercefield v. Remington Arms Co., 375 Mich. 85 [133 N. W. 2d 129, 134-136]; Mitchell v. Miller, 26 Conn. Supp 142 [214 A. 2d 694, 697-699].) There are also several cases which have permitted recovery in strict liability by persons who were not purchasers or users, although possibly they should not be categorized as bystanders. (Connolly v. Hagi, 24 Conn. Supp. 198 [188 A. 2d 884, 887-888]; Toombs v. Fort Pierce Gas Co., (Fla.) 208 So. 2d 615, 617; Ford Motor Co. v. Cockrell (Miss.) 211 So. 2d 833, 834; Lonzriak v. Republic Steel Corp. 6 Ohio St. 2d 227 [218 N. E. 2d 185, 188 et seq.]; Webb v. Zern, 422 Pa. 424 [220 A. 2d 853, 854].) Several cases, most of them earlier, have refused to extend the doctrine in favor of the bystander. (See Prosser, The Fall of the Citadel, 50 Minn. L. Rev. 791, 820, fn. 154.) In Vandermark v. Ford Motor Co., supra, 61 Cal. 2d 256, one of the plaintiffs was a passenger in the car, but we did not discuss the issue of liability to her separately from the issue of liability to the owner-driver.

In Greenman v. Yuba Power Products, Inc. supra, 59 Cal. 2d 57, 63, we pointed out that the purpose of strict liability upon the manufacturer in tort is to insure that "the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves." We further pointed out that the rejuction of the view that such liability was governed by contract warranties rather than tort rules was shown by cases which had recognized that the liability is not assumed by agreement but imposed by law and which had refused to permit the manufacturer to define its own responsibility for defective products. (59 Cal. 2d at p. 63.) Similarly, in Vandermark v. Ford Motor Co., supra, 61 Cal. 2d 256, 263, we held that, since the retailer is strictly liable in tort, the fact that it restricted its contractual liability was immaterial.

[6] These cases make it clear that the doctrine of strict liability may not be restricted on a theory of privity of contract. Since the doctrine applies even where the manufacturer has attempted to limit liability, they further make it clear that the doctrine may not be limited on the theory that no representation of safety is made to the bystander.

The liability has been based upon the existence of a defective product which caused injury to a human being, and in both Greenman and Vandermark we did not limit the rules stated to consumers and users but instead used language applicable to human beings generally.

It has been pointed out that an injury to a bystander "is often a perfectly foreseeable risk of the maker's enterprise, and the considerations for imposing such risks on the maker without regard to his fault do not stop with those who undertake to use the chattel. [A restriction on the recovery by bystanders] is only the distorted shadow of a vanishing privity which is itself a reflection of the habit of viewing the problem as a commercial one between traders, rather than as part of the accident problem." (2 Harper and James, The Law of Torts (1956) p. 1572 fn. 6.)

If anything, bystanders should be entitled to greater protection than the consumer or user where injury to bystanders from the defect is reasonably foreseeable. Consumers and users, at least, have the opportunity to inspect for defects and to limit their purchases to articles manufactured by reputable manufacturers and sold by reputable retailers, whereas the bystander ordinarily has no such opportunities. In short, the bystander is in greater need of protection from defective products which are dangerous, and if any distinction should be made between bystanders and users, it should be made contrary to the position of defendants, to extend greater liability in favor of the bystanders.

[7] An automobile with a defectively connected drive shaft constitutes a substantial hazard on the highway not only to the driver and passenger of the car but also to pedestrians and other drivers. The public policy which protects the driver and passenger of the car should also

protect the bystander, and where a driver or passenger of another car is injured due to defects in the manufacture of an automobile and without any fault of their own, they may recover from the manufacturer of the defective automobile.

It is urged that even assuming that the doctrine of strict liability in tort is available to an injured bystander in an action against the manufacturer, the doctrine should not be available against the retailer. In Vandermark, we considered the related question of the liability of the retailer to the purchaser and user, and we stated: "Retailers like manufacturers are engaged in the business of distributing goods to the public. They are an integral part of the overall producing and marketing enterprise that should bear the cost of injuries resulting from defective products. (See Greenman v. Yuba Power Products, Inc., 59 Cal. 2d 57, 63 [27 Cal. Rptr. 697, 377 P. 2d 897, 13 A. L. R. 3d 1049].) In some cases the retailer may be the only member of that enterprise reasonably available to the injured plaintiff. In other cases the retailer himself may play a substantial part in insuring that the product is safe or may be in a position to exert pressure on the manufacturer to that end; the retailer's strict liability thus serves as an added incentive to safety. Strict liability on the manufacturer and retailer alike affords maximum protection to the injured plaintiff and works no injustice to the defendants, for, they can adjust the costs of such protection between them in the course of their continuing business relationship. Accordingly, as a retailer engaged in the business of distributing goods to the public,

Maywood Bell is strictly liable in tort for personal injuries caused by defects in cars sold by it." (61 Cal. 2d at pp. 262-263.)

[8] All of the foregoing considerations are as applicable to the bystander's action as that of the purchaser or user, and we are satisfied that the doctrine of strict liability in tort is available in an action for personal injuries by a bystander against the manufacturer and the retailer.

The judgments are reversed.

Traynor, C. J., McComb, J., Tobriner, J., Mosk, J., Burke, J., and Sullivan J., concurred.

Elmore v. American Motors Corp., 70 A. C. A. 615, 620;

Phyllis GRAY, Appellant,

v.

AMERICAN RADIATOR & STANDARD SANITARY CORPORATION, et al.,

Appellees.

No. 35872.

Supreme Court of Illinois.

June 14, 1961.

Rehearing Denied Sept. 20, 1961.

Suit by an Illinois resident for injuries sustained when a water heater allegedly exploded, wherein one defendant, a foreign corporation, moved for dismissal of the complaint and the cross-claim filed against it. The Circuit Court, Cook County, Allen Ashcraft, J., dismissed both the complaint and the cross-claim and the plaintiff appealed. The Supreme Court, Klingbiel, J., held that the foreign corporation, which manufactured in Ohio a safety valve incorporated in Pennsylvania in the hot water heater which was sold to a consumer in Illinois, was subject to the jurisdiction of the Illinois court after service of summons was made upon its registered agent in Ohio.

Reversed and remanded with directions.

1. Courts [6]

Place of wrong is where last event necessary to render actor liable takes place.

2. Courts [6]

"Tortious act", within statute providing that nonresident who commits tortious act within state submits to its jurisdiction, was committed in Illinois where water heater exploded in Illinois as result of alleged defect in safety valve manufactured in Ohio and incorporated in Pennsylvania into heater which was sold to Illinois consumer. S. H. A. ch. 110, § 17(1) (b).

3. Statutes [181(1)]

Intent of statutes should be determined by reading words in their ordinary and popularly understood sense and from consideration of general purpose and effect.

4. Process [83]

Nonresident is subject to jurisdiction of state by process served without state if nonresident is engaged in some act or conduct by which he may be said to have invoked benefits and protection of law of forum

and question whether activity as such depends upon facts in particular case. S. H. A. ch. 110, § 17(1)(b).

5. Corporations [658]

If corporation elects to sell its products for ultimate use in another state, it is answerable in state in which products are used for any damage caused by defects.

6. Corporations [665(2)]

Foreign corporation, which manufactured in Ohio safety valve incorporated in Pennsylvania in hot water heater which was sold to consumer in Illinois, where it exploded injuring Illinois resident, was subject to jurisdiction of Illinois court after service of summons was made upon its registered agent in Ohio. S. H. A. ch. 110, §§ 16, 17(1)(b).

7. Constitutional Law [305]

Courts [25]

Statute to effect that nonresident who commits tortious act within state submits to jurisdiction of state does not violate due process of law. S. H. A. ch. 110, § 17(1)(b).

Victor N. Cardosi, Kankakee, and Leo S. Karlin and Daniel Karlin, Chicago (Leo S. Karlin, and Alan D. Katz, Chicago, of counsel),

for appellant Phyllis Gray.

Baker, McKenzie & Hightower, Chicago (John C. McKenzie and Francis D. Morrissey, Chicago, of counsel), for appellant American Radiator Standard Corp.

Lord, Bissel & Brook, Chicago (Jay M. Smyser and William P. Butler, Chicago, of counsel), for appellees.

KLINGBIEL, Justice

Phyllis Gray appeals from a judgment of the circuit court of Cook County dismissing her action for damages. The issues are concerned with the construction and validity of our statute providing for substituted service of process on nonresidents. Since a constitutional question is involved, the appeal is direct to this court.

The suit was brought against the Titan Valve Manufacturing Company and others, on the ground that a certain water heater had exploded and injured the plaintiff. The complaint charges, inter alia, that the Tital company, a foreign corporation, had negligently constructed the safety valve; and that the injuries were suffered as a proximate result thereof. Summons issued and was duly served on Titan's registered agent in Cleveland, Ohio. The corporation appeared specially, filing a motion to quash on the ground that it had not committed a tortious act in Illinois. Its affidavit stated that it does no business here;

that it has no agent physically present in Illinois; and that it sells the completed valves to defendant, American Radiator & Standard Sanitary Corporation, outside Illinois. The American Radiator & Standard Sanitary Corporation (also made a defendant) filed an answer in which it set up a cross claim against Titan, alleging that Titan made certain warranties to American Radiator, and that if the latter is held liable to the plaintiff it should be indemnified and held harmless by Titan. The court granted Titan's motion, dismissing both the complaint and the cross claim.

Section 16 of the Civil Practice Act provides that summons may be personally served upon any party outside the State; and that as to nonresidents who have submitted to the jurisdiction of our courts, such service has the force and effect of personal service within Illinois. (Ill. Rev. Stat. 1959, chap. 110, par. 16.) Under section 17(1)(b) a nonresident who, either in person or through an agent, commits a tortious act within this State, submits to jurisdiction. (Ill. Rev. Stat. 1959, chap. 110, par. 17.) The questions in this case are (1) whether a tortious act was committed here within the meaning of the statute, despite the fact that the Titan corporation had no agent in Illinois; and (2) whether the statute, if so construed, violates due process of law.

The first aspect to which we must direct our attention is one of statutory construction.

Under section 17(1)(b) jurisdiction is predicated on the committing of a tortious act in this State. It is not disputed, for the purpose of this appeal, that a tortious act was committed. The issue depends on whether it was committed in Illinois, so as to warrant the assertion of personal jurisdiction by service of summons in Ohio.

[1, 2] The wrong in the case at bar did not originate in the conduct of a servant physically present here, but arose instead from acts performed at the place of manufacture. Only the consequences occurred in Illinois. It is well established, however, that in law the place of a wrong is where the last event takes place which is necessary to render the actor liable. Restatement, Conflict of Laws, sec. 377. A second indication that the place of injury is the determining factor is found in rules governing the time within which an action must be brought. In applying statutes of limitation our court has computed the period from the time when the injury is done. Madison v. Wedron Silica Co., 352 Ill. 60, 184 N. E. 901; Leroy v. City of Springfield, 81 Ill. 114. We think it is clear that the alleged negligence in manufacturing the valve cannot be separated from the resulting injury; and that for present purposes, like those of liability and limitations, the tort was committed in Illinois.

[3] Titan seeks to avoid this result by arguing that instead of using the word "tort,"

the legislature employed the term "tortious act"; and that the latter refers only to the act or conduct, separate and apart from any consequences thereof. We cannot accept the argument. To be tortious an act must cause injury. The concept of injury is an inseparable part of the phrase. In determining legislative intention courts will read words in their ordinary and popularly understood sense. Illinois State Toll Highway Comm. v. Einfeldt, 12 Ill. 2d 499, 147 N. E. 2d 53; Farrand Coal Co. v. Halpin, 10 Ill. 2d 507, 140 N. E. 2d 698. We think the intent should be determined less from technicalities of definition than from considerations of general purpose and effect. To adopt the criteria urged by defendant would tend to promote litigation over extraneous issues concerning the elements of a tort and the territorial incidence of each, whereas the test should be concerned more with those substantial elements of convenience and justice presumably contemplated by the legislature. As we observed in Nelson v. Miller, 11 Ill. 2d 378, 143 N. E. 2d 673, the statute contemplates the exertion of jurisdiction over nonresident defendants to the extent permitted by the due-process clause.

The Titan company contends that if the statute is applied so as to confer jurisdiction in this case it violates the requirement of due process of law. The precise constitutional question thus presented has not heretofore been considered by this court. In the Nelson case

the validity of the statute was upheld in an action against a nonresident whose employee, while physically present in Illinois, allegedly caused the injury. The ratio decidendi was that Illinois has an interest in providing relief for injuries caused by persons having "substantial contacts within the State." A standard of fairness or reasonableness was announced, within the limitation that defendant be given a realistic opportunity to appear and be heard. The case at bar concerns the extent to which due process permits substituted service where defendant had no agent or employee in the State of the forum.

Under modern doctrine the power of a State court to enter a binding judgment against one not served with process within the State depends upon two questions: first, whether he has certain minimum contacts with the State (see International Shoe Co. v. State of Washington, 326 U.S. 310, 316, 66 S. Ct. 154, 90 L. Ed. 95, 102), and second, whether there has been a reasonable method of notification. See International Shoe Co. v. State of Washington, 326 U.S. 310, 320, 66 S. Ct. 154, 90 L. Ed. 95, 104-105; Nelson v. Miller, 11 Ill. 2d 378, 390, 143 N. E. 2d 673. In the case at bar there is no contention that section 16 provides for inadequate notice or that its provisions were not followed. Defendant's argument on constitutionality is confined to the proposition that applying section 17(1)(b), where the injury is defendant's only contact with the State, would exceed the limits of due process.

A proper determination of the question presented requires analysis of those cases which have dealt with the quantum of contact sufficient to warrant jurisdiction. Since the decision in Pennoyer v. Neff, 95 U.S. 714, 24 L. Ed. 565, the power of a State to exert jurisdiction over nonresidents has been greatly expanded, particularly with respect to foreign corporations. See Annotations, 2 L. Ed. 2d 1664, 94 L. Ed. 1167. International Shoe Co. v. State of Washington, 326 U.S. 310, 66 S. Ct. 154, 90 L. Ed. 95, was a proceeding to collect unpaid contributions to the unemployment compensation fund of the State of Washington. A statute purported to authorize such proceedings, where the employer was not found within the State, by sending notice by registered mail to its last known address. The defendant foreign corporation, a manufacturer of shoes, employed certain salesmen who resided in Washington and who solicited orders there. In holding that maintenance of the suit did not violate due process the court pointed out that the activities of the corporation in Washington were not only continuous and systematic but also gave rise to the liability sued on. It was observed that such operations, which resulted in a large volume of business, established "sufficient contacts or ties with the state of the forum to make it reasonable and just according to our traditional conception of fair play and substantial justice to permit the state to enforce the obligations which appellant has incurred there." 326 U.S. at page 320, 66 S. Ct. at page 160, 90 L. Ed. at page 104.

Where the business done by a foreign

corporation in the State of the forum is of a sufficiently substantial nature, it has been held permissible for the State to entertain a suit against it even though the cause of action arose from activities entirely distinct from its conduct within the State. Perkins v. Benguet Consolidated Mining Co., 342 U.S. 437, 72 S.Ct. 413, 96 L.Ed. 485. But where such business or other activity is not substantial, the particular act or transaction having no connection with the State of the forum, the requirement of "contact" is not satisfied. Hanson v. Denckla, 357 U.S. 235, 253, 78 S.Ct. 1228, 2 L.Ed.2d 1283, 1298.

In the case at bar the defendant's only contact with this State is found in the fact that a product manufactured in Ohio was incorporated in Pennsylvania, into a hot water heater which in the course of commerce was sold to an Illinois consumer. The record fails to disclose whether defendant has done any other business in Illinois, either directly or indirectly; and it is argued, in reliance on the International Shoe test, that since a course of business here has not been shown there are no "minimum contacts" sufficient to support jurisdiction. We do not think, however, that doing a given volume of business is the only way in which a nonresident can form the required connection with this State. Since the International Shoe case was decided the requirements for jurisdiction have been further relaxed, so that at the present time it is sufficient if the act or transaction itself has a substantial connection with the State of the forum.

In McGee v. International Life Insurance Co., 355 U.S. 220, 78 S. Ct. 199, 201, 2 L. Ed. 2d 223, suit was brought in California against a foreign insurance company on a policy issued to a resident of California. The defendant was not served with process in that State but was notified by registered mail at its place of business in Texas pursuant to a statute permitting such service in suits on insurance contracts. The contract in question was delivered in California, the premiums were mailed from there and the insured was a resident of that State when he died, but defendant had no office or agent in California nor did it solicit any business there apart from the policy sued on. After referring briefly to the International Shoe case the court held that "it is sufficient for purposes of due process that the suit was based on a contract which had substantial connection" with California. (Emphasis supplied.)

In Smyth v. Twin State Improvement Corp., 116 Vt. 569, 80 A. 2d 664, 666, 25 A. L. R. 2d 1193, a Vermont resident engaged a foreign corporation to re-roof his house. While doing the work the corporation negligently damaged the building, and an action was brought for damages. Service of process was made on the Secretary of State and a copy was forwarded to defendant by registered mail at its principal place of business in Massachusetts. A Vermont statute provided for such substituted service on foreign corporations committing a tort in Vermont against a resident of Vermont. In holding that the statute affords due process of law, the court discussed the principal authorities on the

question and concluded, inter alia, that "continuous activity within the state is not necessary as a prerequisite to jurisdiction."

In Nelson v. Miller, 11 Ill. 2d 378, 143 N. E. 2d 673, the commission of a single tort within this State was held sufficient to sustain jurisdiction under the present statute. The defendant in that case, a resident of Wisconsin, was engaged in the business of selling appliances. It was alleged that in the process of delivering a stove in Illinois, an employee of the defendant negligently caused injury to the plaintiff. In holding that the defendant was not denied due process by being required to defend in Illinois, this court observed at page 390 of 11 Ill. 2d, at page 680 of 143 N. E. 2d: "The defendant sent his employee into Illinois in the advancement of his own interests. While he was here, the employee and the defendant enjoyed the benefit and protection of the laws of Illinois, including the right to resort to our courts. In the course of his stay here the employee performed acts that gave rise to an injury. The law of Illinois will govern the substantive rights and duties stemming from the incident. Witnesses, other than the defendant's employee, are likely to be found here, and not in Wisconsin. In such circumstances, it is not unreasonable to require the defendant to make his defense here."

[4] Whether the type of activity conducted within the State is adequate to satisfy the requirement depends upon the facts in the particular case. Perkins v. Benguet Consolidated Mining Co., 342 U. S. 437, 445, 72 S. Ct. 413, 96 L. Ed.

485, 492. The question cannot be answered by applying a mechanical formula or rule of thumb but by ascertaining what is fair and reasonable in the circumstances. In the application of this flexible test the relevant inquiry is whether defendant engaged in some act or conduct by which he may be said to have invoked the benefits and protections of the law of the forum. See Hanson v. Denckla, 357 U.S. 235, 253, 78 S. Ct. 1228, 2 L. Ed. 2d 1283, 1298; International Shoe Co. v. State of Washington, 326 U.S. 310, 319, 66 S. Ct. 154, 90 L. Ed. 95, 104. The relevant decisions since Pennoyer v. Neff show a development of the concept of personal jurisdiction from one which requires service of process within the State to one which is satisfied either if the act or transaction sued on occurs there or if defendant has engaged in a sufficiently substantial course of activity in the State, provided always that reasonable notice and opportunity to be heard are afforded. As the Vermont court recognized the Smyth case, the trend in defining due process of law is away from the emphasis on territorial limitations and toward emphasis on providing adequate notice and opportunity to be heard; from the court with immediate power over the defendant, toward the court in which both parties can most conveniently settle their dispute.

In the McGee case the court commented on the trend toward expanding State jurisdiction over nonresidents, observing that: "In part this is attributable to the fundamental transformation of our national economy over the years. Today many commercial transactions touch two or

more States and may involve parties separated by the full continent. With this increasing nationalization of commerce has come a great increase in the amount of business conducted by mail across state lines. At the same time modern transportation and communication have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity."

It is true that courts cannot "assume that this trend heralds the eventual demise of all restrictions on the personal jurisdiction of state courts." Hanson v. Denckla, 357 U.S. 235, 251, 78 S. Ct. 1228, 1238, 2 L. Ed. 2d 1283, 1296. An orderly and fair administration of the law throughout the nation requires protection against being compelled to answer claims brought in distant States with which the defendant has little or no association and in which he would be faced with an undue burden or disadvantage in making his defense. It must be remembered that lawsuits can be brought on frivolous demands or groundless claims as well as on legitimate ones, and that procedural rules must be designed and appraised in the light of what is fair and just to both sides in the dispute. Interpretations of basic rights which consider only those of a claimant are not consonant with the fundamental requisites of due process.

In the case at bar defendant does not claim that the present use of its product in Illinois is an isolated instance. While the record does not disclose the volume of Titan's business or the territory in which appliances incorporating its

valves are marketed, it is a reasonable inference that its commercial transactions, like those of other manufacturers, result in substantial use and consumption in this State. To the extent that its business may be directly affected by transactions occurring here it enjoys benefits from the laws of this State, and it has undoubtedly benefited, to a degree, from the protection which our law has given to the marketing of hot water heaters containing its valves. Where the alleged liability arises, as in this case, from the manufacture of products presumably sold in contemplation of use here, it should not matter that the purchase was made from an independent middleman or that someone other than the defendant shipped the product into this State.

With the increasing specialization of commercial activity and the growing inter-dependence of business enterprises it is seldom that a manufacturer deals directly with consumers in other States. The fact that the benefit he derives from its laws is an indirect one, however, does not make it any the less essential to the conduct of his business; and it is not unreasonable where a cause of action arises from alleged defects in his product, to say that the use of such products in the ordinary course of commerce is sufficient contact with this State to justify a requirement that he defend here.

[5] As a general proposition, if a corporation elects to sell its products for ultimate use in another State, it is not unjust to hold it answerable there for any damage caused by defects in those products. Advanced means of distribution

and other commercial activity have made possible these modern methods of doing business, and have largely effaced the economic significance of State lines. By the same token, today's facilities for transportation and communication have removed much of the difficulty and inconvenience formerly encountered in defending lawsuits brought in other States.

Unless they are applied in recognition of the changes brought about by technological and economic progress, jurisdictional concepts which may have been reasonable enough in a simpler economy lose their relation to reality, and injustice rather than justice is promoted. Our unchanging principles of justice, whether procedural or substantive in nature, should be scrupulously observed by the courts. But the rules of law which grow and develop within those principles must do so in the light of the facts of economic life as it is lived today. Otherwise the need for adaptation may become so great that basic rights are sacrificed in the name of reform, and the principles themselves become impaired.

[6] The principles of due process relevant to the issue in this case support jurisdiction in the court where both parties can most conveniently settle their dispute. The facts show that the plaintiff, an Illinois resident, was injured in Illinois. The law of Illinois will govern the substantive questions, and witnesses on the issues of injury, damages and other elements relating to the occurrence are most likely to be found here. Under such circumstances the

courts of the place of injury usually provide the most convenient forum for trial. See Watson v. Employers Liability Assurance Corp., 348 U.S. 66, 72, 75 S.Ct. 166, 99 L.Ed. 74, 82. In Travelers Health Association v. Commonwealth of Virginia, 339 U.S. 643, 70 S.Ct. 927, 94 L. Ed. 1154, a Nebraska insurance corporation was held subject to the jurisdiction of a Virginia regulatory commission although it had no paid agents within the State and its only contact there was a mail-order business operated from its Omaha office. The court observed, by way of dictum, that "suits on alleged losses can be more conveniently tried in Virginia where witnesses would most likely live and where claims for losses would presumably be investigated. Such factors have been given great weight in applying the doctrine of forum non conveniens. See Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508, 67 S.Ct. 930, 843, 91 L.Ed. 1055, 1062. And prior decisions of this Court have referred to the unwisdom, unfairness and injustice of permitting policyholders to seek redress only in some distant state where the insurer is incorporated. The Due Process Clause does not forbid a state to protect its citizens from such injustice." 339 U.S. at page 649, 70 S.Ct. at page 930, 94 L.Ed. 1161-1162. We think a similar conclusion must follow in the case at bar.

We are aware of decisions, cited by defendant, wherein the opposite result was reached on somewhat similar factual situations. See Erlanger Mills, Inc. v. Cohoes Fibre Mills, Inc., 4 Cir., 239 F. 2d 502; Hellriegel v. Sears Roebuck & Co., D.C. N.D. Ill. E.D., 157 F. Supp.

718; Johns v. Bay State Abrasive Products Co., D. C. D. Md. 89 F. Wupp. 654. Little purpose can be served, however, by discussing such cases in detail, since the existence of sufficient "contact" depends upon the particular facts in each case. In any event we think the better rule supports jurisdiction in cases of the present kind. We conclude accordingly that defendant's association with this State is sufficient to support the exercise of jurisdiction.

[7] We construe section 17(1) (b) as providing for jurisdiction under the circumstances shown in this case, and we hold that as so construed the statute does not violate due process of law.

The trial court erred in quashing service of summons and in dismissing the complaint and cross claim. The judgment is reversed and the cause is remanded to the circuit court of Cook County, with directions to deny the motion to quash.

Reversed and remanded, with directions.

Gray v. American Radiator,

176 N. E. 2d 761.

APPENDIX "B"

ORDER DUE
February 17, 1969

ORDER DENYING HEARING
AFTER JUDGMENT BY THE
COURT OF APPEAL

3rd District, Division -- Civil No. 12033

IN THE SUPREME COURT OF THE STATE
OF CALIFORNIA

IN BANK

A. R. INDUSTRIES, INC.,
Petitioner
v.
THE SUPERIOR COURT OF THE COUNTY
OF SACRAMENTO, Respondent;
CERVANTES, Real Party in Interest

Petition for hearing DENIED.

FILED
FEB 13 1960
WILLIAM I. SULLIVAN,
Clerk.
By S. C. Hawkins
S. F. Deputy

Acting Chief Justice

I, WILLIAM I. SULLIVAN, Clerk of the Supreme Court of the State of California, do hereby certify that the preceding is a true copy of an order of this Court, as shown by the records of my office.

Witness my hand and the seal of the Court this 22nd day of April A. D. 1969.

WILLIAM I. SULLIVAN,
Clerk

By S. C. Hawkins
Deputy Clerk

Rust, Hoffman & Mills
Received
Dec 20 1968

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA IN AND FOR THE THIRD APPELLATE DISTRICT

A. R. INDUSTRIES, INC., Petitioner, vs. THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF SACRAMENTO, Respondent, FRANK CERVANTES, Real Party in Interest.	3 Civil No. 12033
	Filed: DEC 19 1968

Petitioner, A. R. Industries, Inc., an Ohio corporation, seeks a writ of mandate to require the Sacramento County Superior Court to quash service of summons. Service was pursuant to Code of Civil Procedure section 411, subdivision (2), upon the theory that defendant was "doing business" in this state. After reviewing the evidence, we have concluded that Industries' contention that service offended the due process clause of the Fourteenth Amendment cannot be sustained.

The pending action was brought by Cervantes, the real party in interest. The action was based upon bodily injuries allegedly caused to him by a defective buffing machine. That machine was one of three 3.8 ton buffing machines manufactured in 1965 by Industries in its home state, Ohio, and purchased by Formica, a subsidiary of American Cyanimid, a New Jersey corporation. All transactions regarding the purchase and sale were handled between the seller and the buyer in either New Jersey or Ohio. The sale was the result of a call for bids by Formica. After manufacture the three machines had been shipped by Industries direct to Formica's plant in California by common carrier f.o.b. such plant. The contract was not completed until delivery of the machines. They were not sent on consignment. Industries retained no title. They were sold for use and not for resale. Installation was by Formica. Industries was not qualified to transact business in California. Industries owned no property here. It had no California offices or representatives. It advertised, however, in national advertising media. It had previously delivered at least one of its products, a cement lintel machine, in California. No contention is made in the main action that Industries did not receive substituted service seasonably.

Historically the jurisdiction of courts to render in personam judgments "is grounded on their de facto power over the defendant's person. Hence his presence within the territorial jurisdiction of a court was prerequisite to its rendition of a judgment personally binding him.

Pennoyer v. Neff, 95 U.S. 714, 733, 34 L. ed. 565, 572. But now . . . due process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' [Citations.]" (Italics ours.) (International Shoe Co. v. Washington, 326 U.S. 310, 316, 90 L. Ed. 95, 102.)

International Shoe was cited and its concept was repeated thusly by our Supreme Court in Fisher Governor Co. v. Superior Court (1959) 53 Cal. 2d 222, at page 224; "Code of Civil Procedure, section 411, subdivision 2, authorizes service of process on foreign corporations that are "doing business in this State." 'That term is a descriptive one that the courts have equated with such minimum contacts with the state "that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' " . . . Whatever limitation it imposes is equivalent to that of the due process clause.' " '[D]oing business' within the meaning of section 411 of the Code of Civil Procedure is synonymous with the power of the state to subject foreign corporations to local process." ' [Citations.]" (Italics ours.)

A balancing process takes place when, after establishing the fact that "minimum contacts" have occurred within the forum state, the courts try to determine whether such contacts reach a status adequate to satisfy

"traditional notions of fair play and substantial justice," or as it has been otherwise expressed, "the fair and orderly administration of the laws which it was the purpose of the due process clause to insure." (International Shoe Co. v. Washington, supra, at p. 104 of 90 L. Ed.) Due process is not met, of course, when a court of the forum attempts to make a binding "in personam" judgment against an individual or corporate defendant with which the state has no "contacts, ties, or relations." On the other hand, to the extent that a foreign corporation exercises the privilege of conducting activities within a state it derives benefits and protection of the laws of the state which may justly give rise to corresponding obligations connected with those activities. A suit brought to enforce such obligations "can, in most instances, hardly be said to be undue." (International Shoe Co. v. Washington, supra, at p. 104.)

Fisher Governor Co. v. Superior Court, supra, 53 Cal. 2d 222, reviews many factors which courts have considered relevant in the balancing process suggested above. These are, as stated on pages 225-226: the interest of the state in providing a forum for its residents; the relative availability of evidence and the burden of defense and prosecution in one place rather than another; the ease of access to an alternative forum; the avoidance of multiplicity of suits and conflicting adjudications; and the extent to which the cause of action arose out of defendant's local activities. In Fisher the action, similar to the action with which we are concerned, arose from injuries sustained from

allegedly defective equipment manufactured by the defendant. Unlike the instant case, however, the cause of action did not arise in California; it arose in Idaho. Our Supreme Court there deemed defendant's "minimum activities" (sales of its products through manufacturers' agents) sufficient to have satisfied due process had the cause of action related to the defendant corporation's activities within this state. It cited Cosper v. Smith & Wesson Arms Co. (1959) 53 Cal. 2d 77, where the cause of action had arisen in California (injuries from a defective gun), and where under "essentially similar sales activities" jurisdiction in California was sustained. In Fisher, however, for the reason stated, California jurisdiction was denied. The court states on page 226: " . . . Evidence can be produced as easily or more easily elsewhere, and even if plaintiffs cannot secure jurisdiction over Fisher in Idaho, they can prosecute their actions against Fisher as conveniently in Iowa as here." The opinion also points out that there was no evidence in the record to support the contention "that jurisdiction over Fisher's codefendants can only be secured in California." Thus, "duplicity of litigation" did not appear.

In McGee v. International Life Ins. Co. (1957) 355 U. S. 220, 222-223, 2 L. Ed. 2d 223, 226, it is said: "Looking back over this long history of litigation a trend is clearly discernible toward expanding the permissible scope of state jurisdiction over foreign corporations and other nonresidents. In part this is attributable to the fundamental transformation of our national economy over the years. Today many commercial transactions touch two or more States and

may involve parties separated by the full continent. With this increasing nationalization of commerce has come a great increase in the amount of business conducted by mail across state lines. At the same time modern transportation and communication have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity." In McGee the original life insurance contract was made in a state other than California between plaintiff's decedent and defendant's predecessor. Defendant, a foreign corporation, reinsured and mailed a certificate of reinsurance to decedent, then a resident of California. In holding defendant amenable to the jurisdiction of the California courts the opinion in McGee makes this observation (on p. 226 of 2 L. Ed. 2d): ". . . It cannot be denied that California has a manifest interest in providing effective means of redress for its residents when their insurers refuse to pay claims. These residents would be at a severe disadvantage if they were forced to follow the insurance company to distant State in order to hold it legally accountable. When claims were small or moderate individual claimants frequently could not afford the cost of bringing an action in a foreign forum--thus in effect making the company judgment proof. Often the crucial witnesses--as here on the company's defense of suicide--will be found in the insured's locality. Of course there may be inconvenience to the insurer if it is held amenable to suit in California where it had this contract but certainly nothing which amounts to a denial of due process." McGee involved a

single transaction, a contract reaffirmed in California; the case before us involves a history of at least two deliveries. There are numerous "flow of products in the stream of commerce" cases. One of them is Regie Nationale Des Usines Renault v. Superior Court (1962) 209 Cal. App. 2d 702 (hear. den.), a decision of this court. It holds that a corporation created and owned by the French government which manufactured Renault automobiles and sold them to a New York corporation, a wholly owned subsidiary, who sold to various American distributors who sold to dealers who sold to consumers in California, could not by marketing through a "hierarchy" of agents insulate itself against assertion of California jurisdiction. (Cf. daSilveira v. Westphalia Separator Co. (1967) 248 Cal. App. 2d 789.)

It is to be noted that in Hanson v. Denckla (1958) 357 U.S. 235, 2 L. Ed. 2d 1283, the court, while acknowledging the trend discussed in McGee v. International Life Ins. Co., supra (p. 1296 of 2 L. Ed. 2d), warns that it is a mistake to assume that it "heralds the eventual demise of all restrictions on the personal jurisdiction of state courts." However, minimal the burden of defending in a foreign tribunal, a defendant may not be called upon to do so unless he had had "minimal contacts" with the forum state. That is a prerequisite to its exercise of power over such defendant. But while issuing that warning it is also said in pointing to "fairness" as the test of subjecting the defendant to the foreign court's jurisdiction: " . . . The making of a single contract, or the commission

of a single tort, within a jurisdiction may be a contact sufficient. . . ." (See "Development of the doctrine of Pennoyer v. Neff as regards jurisdiction over nonresident individuals and foreign corporations--Supreme Court cases," 2 L. Ed. 2d 1664, 1666, 1665-1668.)

Most of what we have stated above has been cogently stated by our appellate court, Fifth District, in Waco-Porter Corp. v. Superior Court (1963) 211 Cal. App. 2d 559. (See also H. Liebes & Co. v. Erica Shoes, Inc. (1965) 237 Cal. App. 2d 25.)

Gray v. American Radiator & Standard Sanitary Corp. (1961) (Ill.) 176 N. E. 2d 761, is a frequently cited case. It involved a suit brought in Illinois against a foreign manufacturer of an allegedly defective valve which had been incorporated into a water heater. The suit was for personal injuries suffered when the heater exploded. Both the valve and the heater had been manufactured outside Illinois, the valve had been installed into the heater outside Illinois, and the heater had been then sold and delivered into Illinois in the course of commerce. Defendant valve manufacturer maintained no agents in Illinois, and the record did not disclose whether or not defendant had done any other business in that state, either directly or indirectly.

A lower court order quashing service of summons was reversed. The court emphasized that the state has an interest in providing relief for its residents where their injuries have been

caused by nonresidents having substantial contacts within the state. It stated that proof of a given volume of business was not a determinative factor (McGee is cited and discussed); that the question whether contacts are sufficient depends upon the facts of the particular case, in the determination of which mechanical formula and rules of thumb are not helpful to a decision as to what is fair and reasonable in the circumstances. The question to be answered, says the court is: Has the defendant invoked the benefits and protections of the law of the forum? In discussing that question the opinion states (on p. 766): "With the increasing specialization of commercial activity and the growing interdependence of business enterprises it is seldom that a manufacturer deals directly with consumers in other States. The fact that the benefit he derives from its laws is an indirect one, however, does not make it any the less essential to the conduct of his business; and it is not unreasonable, where the cause of action arises from alleged defects in his product, to say that the use of such products in the ordinary course of commerce is sufficient contact with this State to justify a requirement that he defend here.

". . . Advanced means of distribution and other commercial activity have made possible these modern methods of doing business, and have largely effaced the economic significance of State lines. By the same token, today's facilities for transportation and communication have removed much of the difficulty and inconvenience formerly encountered in defending lawsuits. . . ."

The court also states that unless jurisdictional concepts are applied in recognition of technological and economic progress, such concepts, although they may have been reasonable enough in a simpler economy, lose their relation to reality.

A California case which has cited Gray is the recent case of Leach Co. v. Superior Court (Oct. 1968) 266 A.C.A. 521. It involved an action brought for personal injuries sustained by a California resident when a garbage container toppled over. The manufacturer of the container was a foreign corporation. The appellate court granted a peremptory writ to quash service of summons under Code of Civil Procedure section 411, subdivision 2. We cannot quarrel with the result since there is nothing in the opinion showing how the garbage container got into California. We cannot tell therefore whether the manufacturer maintained minimum contacts here. It was stated the manufacturer "maintained no office, agents or employees in California, solicited no sales and conducted no other activities within the state, and sold products manufactured in Wisconsin through an independent firm operating in New York City." The opinion states (on page 522): "There may well be no constitutional inhibition against the California court taking jurisdiction in these circumstances." (Citing, inter alia, McGee and Gray.) It goes on to say, however, that although acceptance of California jurisdiction possibly would not violate due process, it could not, as a matter of statutory interpretation, meet the requirement (Code Civ. Proc.,

§ 411, subd. 2) which states that jurisdiction must depend upon the fact that the foreign corporation is " 'doing business in this state.' " The opinion in Leach overlooks that Fisher Governor Co. v. Superior Court, supra, 53 Cal. 2d 222, equates " 'doing business in this State' " under section 411, subdivision 2, with the existence of such minimum contacts by the corporation within the state that the maintenance of the suit does not offend " 'traditional notions of fair play and substantial justice.' " That is the test of due process. As stated, Fisher expressly states that " ' "doing business" within the meaning of section 411 . . . is synonymous with the power of the state to subject foreign corporations to local process.' . . ." We disagree therefore with the reasoning in Leach. (See Bibie v. T. D. Publishing Corp. (1966) (Cal.) 252 F. Supp. 185, 191.)

We apply the principles of International Shoe, McGee, Fisher, Cosper, Waco-Porter, Regie and Gray to the facts of the case before us.

We have read the cases cited by petitioner; also we have examined numerous other cases. They are distinguishable either upon the basis that in those cases there were "no contacts, ties, or relations" of the foreign corporation sought to be sued in California or, at most, contacts insufficient to meet the "traditional notions of fair play and substantial justice" required by due process. Some are distinguishable in that they antedate International Shoe. No point is served by further extension of this

opinion to cite and distinguish all of these cases separately. Since principal reliance is placed upon Yeck Mfg. Co. v. Superior Court (1962) 202 Cal. App. 2d 645, we note the following observation by the court therein (on p. 653): "... The record reveals nothing as to the extent of petitioner's deliveries in California or who, if any other persons, purchased their goods. ... [T]he factual evidence shows nothing but a sale in Michigan to a California wholesaler ... and the wholesaler making his own independent sales in this State of his own property to a retailer who in turn sold to Rowell." That distinguishes Yeck from the case at bench. (Whether it justifies a contrary rule, we do not have to, and do not, decide.)

Industries maintained no office, owned no property, sent no traveling salesmen, into California. But it did advertise in national media and the products described above had been sold and delivered by Industries into California for use (as distinct from resale). We do not deem the fact decisive but the infrequency of California transactions may be related to the fact that these machines were manufactured to specification and were of a size and nature calculated to supply a restricted market. "Minimum contacts" in California were established. We turn to "traditional notions of fair play and substantial justice." Industries has benefited by, and received the protection of, the laws of California. It thus owed corresponding obligations. The cause of action arose here. We balance the inconvenience to Industries in coming into California to defend this suit against

the probability that indispensable witnesses probably reside here, and we consider the cost, the difficulty, and perhaps the impossibility of ascertainment of truth of the merits of Cervantes' claim should it have to prosecute its claim in an eastern jurisdiction. The balancing scales tip heavily in favor of permitting Cervantes to maintain his cause of action in California. Industries by delivery of machines here--machines which, it must have known, would, if defective, cause injuries such as those claimed-should fairly come here to defend against this claim. Due process was satisfied. We cite the following cases holding that deliveries in the stream of commerce subjected the corporation to the jurisdiction of the state of forum. [1]

---

1 See Continental Oil Co. v. Atwood & Morrill Co. (1967) (Mont.) 265 F. Supp. 692; Hutchinson v. Boyd & Sons Press Sales, Inc. (1960) (Minn.) 188 F. Supp. 876; Phillips v. Anchor Hocking Glass Corp. (1966) (Ariz.) 413 P. 2d 732; Sheridan v. Cadet Chemical Corp. (1963) (Conn. Super. Ct.) 195 A. 2d 766; Andersen v. National Presto Industries, Inc. (1965) (Iowa) 135 N. W. 2d 639; Foye v. Consolidated Baling Machine Co. (1967) (Me.) 229 A. 2d 196; Ehlers v. U. S. Heating & Cooling Mfg. Corp. (1963) (Minn.) 124 N. W. 2d 824; Metal-Matic, Inc. v. Eighth Judicial District Ct. (1966) (Nev.) 415 P. 2d 617.

The alternative writ of mandamus is discharged. The petition is denied.

Pierce, P. J.

We concur:

Friedman, J.

Regan, J.

EXHIBIT "D"

RECEIVED
Jun 6 1968
Rust & Hoffman

SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF SACRAMENTO

June 3, 1968, Court met at 9:00 a. m. Department No. 23, Hon. B. ABBOTT GOLDBERG, Judge, J. T. Cohoon, Deputy Clerk, Don Corbett, Bailiff

TITLE:
FRANK CERVANTES,
180764 vs.
A. R. INDUSTRIES, INC., et al.

COUNSEL:

O'CONNOR & LEWIS By: JACK SEAVEY

RUST, HOFFMAN & MILLS
By: MICHAEL GESSFORD

NATURE OF PROCEEDINGS:

MOTION TO QUASH SERVICE OF SUMMONS

COURT'S DECISION ON SUBMITTED MATTER

The record shows that the allegedly defective buffing machine was sent into California by the defendant manufacturer, A. R. Industries knowing that it was to be used here and without the intervention of any intermediaries such as a wholesaler or distributor, who might control the place to which the equipment would be delivered. This is a sufficient minimal contact for purposes of personal jurisdiction. Waco - Porter Corp. v. Superior Court, 211 Cal. App. 2d 559, 566-67 (1963); H. Liebes & Company v. Erica Shoes, Inc., 237 Cal. App. 2nd 25, 32, 34 (1965). Compare: Yeck Manufacturing Corp. v. Superior Court, 202 Cal. App. 2d 645, 653 (1962) "The record reveals nothing as to the extent of Petitioner's deliveries in California" DaSilveira v. Westphalia Separator Co., 248 Cal. App. 2d 789, 783 (1967) shipment of product into California by distributor rather than manufacturer.

The Motion to Quash Service of Summons is DENIED.

Both Counsel

Action No. 180764

APPENDIX "C"

EXHIBIT "E"

A F F I D A V I T

The undersigned, Albert C. Reckman, being first duly sworn, does hereby swear and affirm that to the best of his knowledge the following statement is true and correct as set down.

The undersigned is President of A R Industries, Inc., an Ohio corporation, with its principal address being Beech Street and Railroad Avenue, Cincinnati 17, Ohio, and in such capacity he is familiar with and aware of the circumstances surrounding the purchase of three buffing machines from A R Industries, Inc. by Formica Corporation, a subsidiary of American Cyanamid Company, during the latter part of 1964 and 1965.

Formica Corporation, which for a period of time during which its main offices were located in Cincinnati, Ohio, and thereafter, subsequent to its sale to American Cyanamid Company, of Wayne, New Jersey, had an ongoing customer relationship with A R Industries, Inc., did in a normal course of events in the summer of 1964 provide plans and specifications to A R Industries, Inc. and place an order for the construction of a buffing machine. This machine was built by A R Industries, Inc. and

delivered to Formica Corporation in Cincinnati where it is presently in operation. Thereafter, on satisfaction of Formica with the Cincinnati machine, and with no further solicitation, a quotation request was received, under the letterhead of American Cyanamid, a copy of which is attached hereto as Exhibit A, by A R Industries, Inc (misstyled A & R Industries) on May 3, 1965. This was subsequently revised in the quotation request attached hereto as Exhibit B and dated May 6, 1965.

Thereafter on May 14, 1965, A R Industries, Inc., issued a price quotation which is attached hereto as Exhibit C.

The first appearance of Formica Corporation into the picture was with the issuance of American Cyanamid's purchase order No. EC-6155-7 on June 3, 1965, a copy of which purchase order is attached as Exhibit D. Thereafter on July 1, 1965, American Cyanamid provided specific drawings which they wanted followed in the construction of these machines. A copy of this cover letter is attached hereto as Exhibit E.

The machines were completed and shipped by common carrier on October 11, 1965, as shown by the bill of lading, a copy of which is attached hereto as Exhibit F. Thereafter a bill was sent from A R Industries to Formica Corporation -- a Subsidiary of American Cyanamid Company, Berdan Avenue, Wayne, New Jersey, Attention Mr. R. H. Smith, on October 18, 1965, a copy of which is attached

hereto as Exhibit G. Payment was thereafter made on October 30, 1965. While the records of A R Industries do not show the source of payment check, the undersigned has been advised through his attorney in conversation with the above referred to Mr. R. H. Smith of the offices of American Cyanamid Company in Wayne, New Jersey, that it was the practice of American Cyanamid at this point in time to pay such invoices directly from Wayne, New Jersey.

To reiterate, the undersigned swears and affirms that no contacts were made in connection with the negotiations, construction or sale of this machinery other than in the States of Ohio and/or New Jersey, and that in conjunction therewith it at no point solicited in the State of California or undertook any activity whatsoever with or in the State of California.

The undersigned states that A R Industries, Inc., at no time had any personnel within the State of California for installation or maintenance, such being done in toto by personnel of the American Cyanamid Company or its subsidiary, Formica Corporation, as was the installation of electric controls, wiring, and dust collection systems.

Further affiant sayeth not.

Albert C. Reckman

Albert C. Reckman

Sworn to and subscribed before me, a Notary Public in and for the State of Ohio, this 10th day of June, 1968, at Cincinnati, Ohio.

Robert L. Kreidler
Notary Public

Robert L. Kreidler
Notary Public, State of Ohio
My commission has no expiration date
Section 147.03 R. C.

QUOTATION REQUEST
NOT AN ORDER

AMERICAN CYANAMID COMPANY
ENGINEERING AND CONSTRUCTION DIVISION
BERDAN AVENUE, WAYNE, NEW JERSEY

BM OR REQ. NO	QUOTATION REQUEST NO	JOB NO
EC-3-0	6127	MA 6155

ALL PROPOSALS MUST BEAR ABOVE LETTERS & NOS

DATE May 3, 1965

A & R Industries
Spring St. & Railroad Ave.
Cincinnati, Ohio

GENTLEMEN:
YOU ARE INVITED TO SUBMIT YOUR PROPOSAL BASED ON THE ATTACHED DESCRIPTION OF OUR REQUIREMENTS. TO RECEIVE CONSIDERATION YOUR PROPOSAL MUST SHOW ALL PRICES AS NET UNIT PRICES WITH EXTENSIONS AND TOTAL PRICE. FREIGHT CHARGES AND ANY APPLICABLE SALES AND/OR USE TAX MUST BE SHOWN AS SEPARATE ITEMS. YOUR PROPOSAL MUST INCLUDE THE FOLLOWING ITEMS:

1. DELIVERY TERMS
2. POINT(S) OF SHIPMENT
3. TERMS OF PAYMENT
4. DELIVERY DATE OR DELIVERY TIME FROM DATE DRAWINGS APPROVED
5. SHIPPING WEIGHT & DIMENSIONS
6. ORIGINATING CARRIER
7. RATE OF TRANSPORTATION

YOUR ATTENTION IS DIRECTED TO THE CONDITIONS ON THE REVERSE SIDE HEREOF. THESE WILL BE INCORPORATED IN ALL PURCHASE ORDERS ISSUED.

IF YOU ARE UNABLE TO QUOTE, PLEASE RETURN THIS FORM MARKED "CANNOT QUOTE" AND ALL ATTACHMENTS.

EXCEPTIONS, IF ANY, TO OUR SPECIFICATIONS MUST BE CLEARLY NOTED ON YOUR PROPOSAL.

FAILURE TO PROVIDE ALL APPLICABLE INFORMATION OR FAILURE TO MEET DUE DATE OF QUOTATION REQUEST MAY RESULT IN YOUR PROPOSAL NOT BEING CONSIDERED

DELIVERY TO OUR JOB LOCATION AT Roseville (Sacramento), Calif. WILL BE REQUIRED BY _____

PLEASE SUBMIT 3 COPIES OF YOUR PROPOSAL TO THE ATTENTION OF MR. W. A. Olsen BY 5/17/65

BRIEF DESCRIPTION AND LIST OF ATTACHMENTS

Buffing Machines in accordance with the attached Cyanamid B/M FA-6155-EC-3 issue 0, dated 4/15/65.

SPECIAL INSTRUCTIONS

Quote earliest delivery of the following:

A. Drawings

B. Equipment

Please quote f.o.b. Roseville, Calif.

S.O. 9621

Exhibit A

QUOTATION REQUEST
NOT AN ORDER

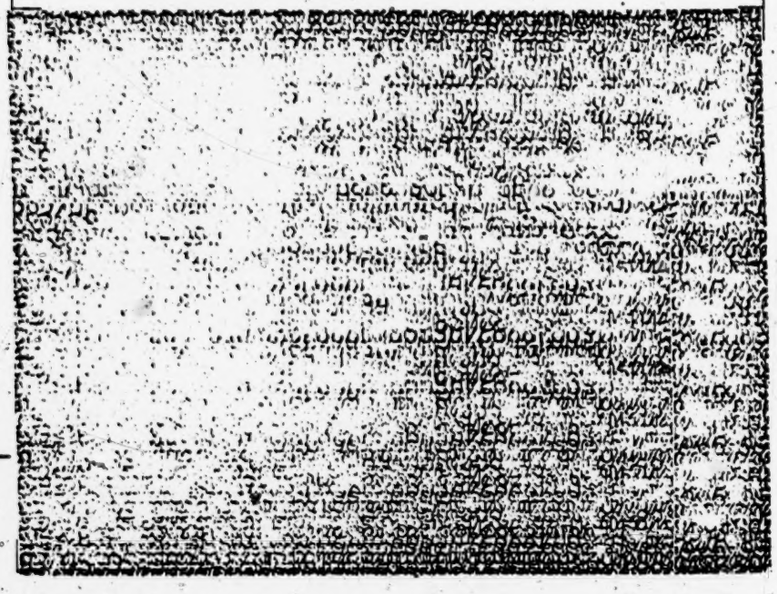
AMERICAN CYANAMID COMPANY
ENGINEERING AND CONSTRUCTION DIVISION
BERDAN AVENUE, WAYNE, NEW JERSEY

BM OR REQ. NO.	QUOTATION REQUEST NO.	JOB NO
EQ-3-1	6127-A	FA-6155

ALL PROPOSALS MUST BEAR ABOVE LETTERS & NOS.

DATE • May 6, 1965

• A & R Industries
Beech St. & Railroad Avenue
Cincinnati, Ohio



GENTLEMEN:

YOU ARE INVITED TO SUBMIT YOUR PROPOSAL BASED ON THE ATTACHED DESCRIPTION OF OUR REQUIREMENTS. TO RECEIVE CONSIDERATION YOUR PROPOSAL MUST SHOW ALL PRICES AS NET UNIT PRICES WITH EXTENSIONS AND TOTAL PRICE. FREIGHT CHARGES AND ANY APPLICABLE SALES AND/OR USE TAX MUST BE SHOWN AS SEPARATE ITEMS. YOUR PROPOSAL MUST INCLUDE THE FOLLOWING ITEMS.

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FAILURE TO PROVIDE ALL APPLICABLE INFORMATION OR FAILURE TO MEET DUE DATE OF QUOTATION REQUEST MAY RESULT IN YOUR PROPOSAL NOT BEING CONSIDERED.

DELIVERY TO OUR JOB LOCATION AT Roseville, Calif. WILL BE REQUIRED BY ~~ASAP~~

PLEASE SUBMIT 3 COPIES OF YOUR PROPOSAL TO THE ATTENTION OF MR. W. A. Olsen BY 5/17/65

BRIEF DESCRIPTION AND LIST OF ATTACHMENTS.

Refer to our quotation request no. 6127 and include all changes as set forth in the attached revised Cyanamid B/M FA-6155-EQ-3 issue 1, dated 5/3/65.

SPECIAL INSTRUCTIONS

J

Exhibit B.

PRICE QUOTATION

Phone 541-8831 Area Code 513

AR INDUSTRIES, INC.

BEECH STREET AND RAILROAD AVE. • CINCINNATI 17, OHIO

To: American Cyanamid Company
Engineering and Construction Div.
Jordan Avenue, Wayne, New Jersey
Attn: W. A. Olsen

Date May 14, 19[illegible]
Quotation No. 65-4[illegible]
Your Inquiry 6127

We are pleased to quote on the following, subject to the terms herein:

QUANTITY	DESCRIPTION	
3	Buffing machines in accordance with Cyanamid P/O FA-6155-EQ-3 issue 1, dated May 3, 1965, and drawings accompanying your quotation request.	$[illegible] ea.
	No allowance has been made for electric controls, wiring or dust collection systems.	

Shipment to be made (4) months after receipt of order.

Terms [illegible]% 10 days Net 30 days F.O.B. Point Roseville, Calif.

[illegible] on this quotation are not subject to verbal changes or other agreements unless approved in writing by the [illegible] of the [illegible] agreements are contingent upon strikes, accidents, fires, availability of materials and [illegible] other [illegible] beyond our control. [illegible] and conditions existing on date of quotation and are subject to change by the Seller before final acceptance. [illegible] unless subject to correction. Purchaser agrees to accept either overage or shortage not in excess of [illegible]% of the [illegible] unless liability for patent and copyright infringement action against are made in Purchaser's [illegible] which [illegible] by the purchaser, ample allowance must be made for reasonable spoilage and material [illegible] quality [illegible] Conditions stated herein shall be governed by established trade customs. Terms inconsistent with those stated herein [illegible] or will not be binding on the Seller

AR INDUSTRIES, INC.

By John Rigas

Exhibit C

PURCHASE ORDER

FORMICA CORPORATION SUBSIDIARY OF
AMERICAN CYANAMID COMPANY
ENGINEERING AND CONSTRUCTION DIVISION
WAYNE, NEW JERSEY 07470

SHEET 1 OF 1

QUOTATION DATE	QUOTATION NO.	DATE OF ORDER
5/14/65	65-494	6/3/65.

P.O. NO. EC-6155-7

JOB ORDER NO: FA-6155

B/M OR REQ. NO. EQ-3-0 & 1

ALL SHIPMENTS, PACKAGES, INVOICES, SHIPPING PAPERS AND CORRESPONDENCE MUST BE MARKED WITH THE ABOVE LETTERS AND NUMBERS.

TO • AR INDUSTRIES, INC.
BEECH STREET AND RAILROAD AVENUE
CINCINNATI 17, OHIO

MAIL INVOICE IN DUPLICATE AND BILL OF LADING TO ACCOUNTING DEPARTMENT AT:

FORMICA CORPORATION - SUBSIDIARY OF
AMERICAN CYANAMID COMPANY
BERDAN AVENUE
WAYNE, NEW JERSEY
ATTENTION: MR. R. H. SMITH

SHIP TO • FORMICA CORPORATION
ROSEVILLE, CALIFORNIA
(5 MI. NORTH OF ROSEVILLE
ON U.S. ROUTE 99)

PLEASE ENTER OUR ORDER AS FOLLOWS SUBJECT TO THE TERMS AND CONDITIONS ON THE REVERSE SIDE HEREOF AND/OR ATTACHED HERETO, WHICH ARE INCLUDED IN AND ARE A PART OF THIS ORDER:

F.O.B. POINT			SHIPPING DATE
DELIVERED JOB SITE ROSEVILLE, CALIFORNIA			OCTOBER 1, 1965
VIA	PPD.	COL.	TERMS
TRUCK	X		1/2 1% 10 DAYS NET 30 DAYS

CODE	ITEM	QUANTITY/UNIT	DESCRIPTION	PRICE
137-3	1	3	BUFFING MACHINES IN ACCORDANCE WITH THE ATTACHED CYANAMID B/M FA-6155-EQ-3 ISSUE 0, DATED 4/15/65, AND ALL DRAWINGS AND SPECIFICATIONS REFERRED TO THEREIN.	
			NOTE: ELECTRIC CONTROLS, WIRING AND DUST COLLECTION SYSTEMS ARE NOT INCLUDED.	
			PRICE	$5,990.00 F.O.B.
			MAKE ALL CHANGES IN ACCORDANCE WITH ATTACHED CYANAMID B/M FA-6155-EQ-3 ISSUE 1, DATED 5/3/65.	
			ADVISE ANY CHANGE IN PRICE BY JUNE 17, 1965.	
			F.O.B. 9627, 9630, 9631 OCT. 7 1965	

WAO/ap

THIS ORDER NOT VALID UNLESS SIGNED

FORMICA CORPORATION
SUBSIDIARY OF
AMERICAN CYANAMID COMPANY

BY W. A. Olsen

W. A. Olsen

Formica #
Vendor #
201-831-1234

Billed 10/18/65
+5694

Exhibit D

CYANAMID

AMERICAN CYANAMID COMPANY
WAYNE, NEW JERSEY 07470
AREA CODE 201 831-1234

July 1, 1965

A. R. Industries, Incorporated
Buck Street and Railroad Avenue
Cincinnati 17, Ohio

Attention: Mr. J. Riggs

Subject: Job No. FA-6155
P. O. #EC-6155-7
Buffing Machines

Gentlemen:

Attached you will find one (1) copy of the attached drawings for Buffing Machines:

415-010-61D	Assembly
415-010-62D	Details
416-001-07E-2	Rouge Gun Assembly
416-001-08E-2	Details
416-001-09E-2	"
416-416-12C-1	"
416-416-14C-1	"
416-416-15C-1	"
416-416-16E-1	"

Very truly yours,

AMERICAN CYANAMID COMPANY

N. S. Fusilli

NSF:gs
Encl.

J

Exhibit E

WORLD WIDE

Form L1-2296

Uniform Domestic Straight Bill of Lading, adopted by Carriers in Official, Southern, Western and Illinois Classification Territories, March 16, 1922, as amended August 1, 1930 and June 15, 1941

UNIFORM STRAIGHT BILL OF LADING

ORIGINAL—NOT NEGOTIABLE.

Shipper's No.

IML FREIGHT, INC. Company

Agent's No.

RECEIVED, subject to the classifications and tariffs in effect on the date of the issue of this Bill of Lading.

At Cincinnati, Ohio Oct. 11 19 65 From AR INDUSTRIES, INC.

the property described below, in apparent good order, except as noted (contents and condition of contents of packages unknown), marked, consigned, and destined as indicated below, which said company (the word company being understood throughout this contract as meaning any person or corporation in possession of the property under the contract) agrees to carry to its usual place of delivery at said destination, if on its own road or its own water line, otherwise to deliver to another carrier on the route to said destination. It is mutually agreed, as to each carrier of all or any of said property over all or any portion of said route to destination, and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the conditions not prohibited by law, whether printed or written, herein contained, including the conditions on back hereof, which are hereby agreed to by the shipper and accepted for himself and his assigns

(Mail or street address of consignee—For purposes of notification only)

Consigned to Formica Corporation

Destination Roseville, State of California County of

(5 Miles North of Roseville on U.S. Route 99)

Route Truck

Delivering Carrier IML Freight, Inc. Car Initial Car No.

NO. PACKAGES	DESCRIPTION OF ARTICLES, SPECIAL MARKS AND EXCEPTIONS	*WEIGHT (Subject to Correction)	CLASS or RATE	CHECK COLUMN
3 Skids	(MACHINERY	22,800 LBS TOTAL 300 SKIDS		
		23,100#		

THE FIBRE BOXES used for this shipment conform to the specifications set forth in the box maker's certificate thereon, and all other requirements of Rule 41 of the Consolidated Freight Classification.

Subject to Section 7 of conditions, if this shipment is to be delivered to the consignee without recourse on the consignor, the consignor shall sign the following statement:
The carrier shall not make delivery of this shipment without payment of freight and all other lawful charges.

Signature of Consignor.

If charges are to be prepaid, write or stamp here, "To be Prepaid."

To Be Prepaid

Received $

to apply in prepayment of the charges on the property described hereon.

Agent or Cashier.

Per

(The signature here acknowledges only the amount prepaid.)

Charges Advanced:

$

*If the shipment moves between two ports by a carrier by water, the law requires that the bill of lading shall state whether it is "carrier's or shipper's weight."
Note.—Where the rate is dependent on value, shippers are required to state specifically in writing the agreed or declared value of the property.

The agreed or declared value of the property is hereby specifically stated by the shipper to be not exceeding $ per

AR INDUSTRIES, INC. Shipper, Per L.R.T. AGENT PER 1

Permanent postoffice address of shipper BEECH ST. & RAILROAD AVENUE, CINCINNATI, OHIO 45217

Exhibit F

INVOICE

AR INDUSTRIES, INC.

BEECH ST. AND RAILROAD AVE. CINCINNATI, OHIO 45217 PHONE 242-0272 AREA CODE 513

SOLD TO Formica Corporation-Subsidiary of
American Cyanamid Company
Lyncan Avenue
Kearny, New Jersey, Attention:
W. J. L. Smith

SHIP TO Formica Corporation
Rosaville, California
(5 Miles North of Rosaville
on U.S. Route 99)

TERMS: ½ OF 1% 10 DAYS, NET 3

INVOICE NO.	INVOICE DATE	DATE SHIPPED
9614	October 18, 1965	Oct. 1965

YOUR ORDER NO.	OUR ORDER NO.	SHIPPED VIA	F. O. B.	SHIPMENT
FA-6155-7	9627.30, 9627	X.M.L. Trucking Co	Rosaville, [illegible]	Complete

QUANTITY	DESCRIPTION	PRICE	TOTAL
1			
3	Buffing Machines in Accordance with the Cyanamid P/O FA-6155-EC-3 Issue 4/15/65. & 5/3/65.	$5990.00 ea	$17,970.00

"We hereby certify that these goods were produced in compliance with all applicable requirements of Sections 6, 7, and 12 of the Fair Labor Standards Act, as amended, and of regulations and orders of the U. S. Dept. of Labor issued under Section 14 thereof."
Prices do not include any Federal, State, City or Local Sales, Use or Occupational Tax. Any taxes we are legally required to collect will be billed separately at a later date.

Exhibit G

EXHIBIT "A"

ENDORSED
MAR 14 1968
W. N. Durley
County Clerk, by
J. T. Cohoon,
Deputy

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF SACRAMENTO

FRANK CERVANTES,

Plaintiff,

vs.

A. R. INDUSTRIES, INC., et al.,

Defendants.

NO. 180764

AFFIDAVIT IN SUPPORT OF MOTION TO QUASH SERVICE OF SUMMONS

ALBERT RECKMAN, being first duly sworn, declares:

I am the President of A. R. INDUSTRIES, INC., a corporation, which is incorporated under the laws of the State of Ohio, with offices at 5201 Beech St., Cincinnati, Ohio.

A. R. INDUSTRIES, INC. is not and never has been licensed or authorized to do business in the State of California.

A. R. INDUSTRIES, INC. does not and never has maintained offices in the State of California.

A. R. INDUSTRIES, INC. is not and has never been qualified with any governmental agency in the State of California.

A. R. INDUSTRIES, INC. does not own any real or personal property in the State of California.

A. R. INDUSTRIES, INC. does not and never has maintained any bank account in the State of California.

A. R. INDUSTRIES, INC. does not and never has locally advertised in any manner in the State of California. Said company advertised in the usual way through the use of national media with said advertising aimed at primarily midwestern purchasers. No advertising was done specifically directed at the State of California.

A. R. INDUSTRIES, INC. is not and never has been listed in any telephone directory in the State of California.

A. R. INDUSTRIES, INC. is not and never has been listed in any publication, official or unofficial, with listing for California businesses.

A. R. INDUSTRIES, INC. does not and never has maintained any California offices, warehouses, stock, materials, agents,

representatives, employees, or the like.

A. R. INDUSTRIES, INC. does not ship goods or materials on consignment to the State of California or ship goods into the State of California where the company retains title to said goods.

A. R. INDUSTRIES, INC. does not and never has had any listing of any offices or agents in the State of California in any catalogue or publication.

A. R. INDUSTRIES, INC. does not and has never employed a person for the purpose of soliciting sales or service in the State of California.

I am familiar with all the facts as set forth above, and if called as a witness I can testify competently thereto.

DATED: March 4, 1968.

Albert Reckman
ALBERT RECKMAN

Signed and sworn to before me this 4th day of March, 1968 by Albert C. Reckman.

Robert L. Kreidler
Notary Public

ROBERT L. KREIDLER
Notary Public, State of Ohio
My commission has no expiration date
Section 147.08 R. C.

EXHIBIT "B"

O'CONNOR & LEWIS
Attorneys At Law
629 Jay Street
Sacramento, California
95814
Telephone: 444-5886

ENDORSED
Mar 29 1968
W. N. Durley
County Clerk, by
J. T. Cohoon,
Deputy

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF SACRAMENTO

-o0o-

FRANK CERVANTES,

Plaintiff,

vs.

A. R. INDUSTRIES, INC., et al.,

Defendants.

No. 180764

INTERROGATORIES TO DEFENDANT

TO: A. R. INDUSTRIES, INC., a corporation, defendant above named and to their attorneys RUST, HOFFMAN & MILLS:

Pursuant to the provisions of Section 2030 of the Code of Civil Procedure of the State of California, plaintiff requests that defendants above named answer the following interrogatories separately, fully and under oath, and serve

said answers upon plaintiff within thirty (30) days after service of these interrogatories.

In answering these interrogatories, furnish such information as is available to you, not merely such information as you know of your own personal knowledge. This means that you are required to furnish information which is in the possession of your attorneys, and which is permissibly inquired into under the present state of the discovery laws. See Section 2030 CCP.

1. State the legal status of defendant A. R. INDUSTRIES INC., a corporation.

2. State the principal place of business of A. R. INDUSTRIES INC., a corporation.

3. State the address of the principal place of business of A. R. INDUSTRIES INC., a corporation.

4. Prior to May 14, 1965, did A. R. INDUSTRIES INC., a corporation, manufacture buffing machines?

5. Did A. R. INDUSTRIES, INC., a corporation, quote to the FORMICA CORPORATION, Roseville, California, on May 14, 1965 a buffing machine for the price of $5,990.00?

(a) If the answer to the above was yes, was the quotation number 65-494?

(b) Was an order for said machine

placed on June 3, 1965?

6. Did the FORMICA CORPORATION, Roseville, California, place an order for a buffing machine, quotation No. 65-494, with the A. R. INDUSTRIES, INC., a corporation, Beach Street and Railroad Avenue, Cincinnati, Ohio, on June 3, 1965?

(a) If the answer to the above is yes, state the name of the representative of the FORMICA CORPORATION that entered into said order.

(b) The name of the representative of A. R. INDUSTRIES INC., a corporation, which entered into said order with FORMICA CORPORATION.

7. Was the buffing machine in question delivered to FORMICA CORPORATION, Roseville, California?

(a) If the answer to the above is yes, state the date that delivery was made.

(b) The mode of transportation that was used to transport said buffing machine from Cincinnati, Ohio to Roseville, California.

(c) Who paid for the shippment of said buffing machine.

(d) Was said buffing machine sent F. O. B.

8. State how many of the buffing machines were sold by A. R. INDUSTRIES, INC., a corporation, to the FORMICA CORPORATION in the years 1963, 1964, 1965.

9. State whether A. R. INDUSTRIES INC., a corporation, manufactured prior to May 14, 1965, buffing machines similar to those sold to the FORMICA CORPORATION by order of June 3, 1965, that in addition to those sold to FORMICA CORPORATION.

10. State the names of the companies, partnerships, and/or corporations to which the A. R. INDUSTRIES INC., a corporation, sold buffing machines similar to the one sold to the FORMICA CORPORATION during the years 1963, 1964, and 1965.

(a) State the names and addresses of said companies to which said buffing machines were sold to during the above years.

11. Does the A. R. INDUSTRIES INC., a corporation, through a publisher or through its own organization publish a pamphlet with the specifications for the sizes and types of buffers sold by A. R. INDUSTRIES INC., a corporation, for use in the buffing and manufacturing of formiča?

(a) If your answer to the above is yes, state the name and address where said pamphlet is published.

(b) Does this pamphlet include

pictures of said buffing machine with said specifications and dimensions?

(c) Is this pamphlet given to perspective buyers of said buffing machines?

(d) Is this pamphlet used by the agents of A. R. INDUSTRIES INC., a corporation, in the sale of said buffing machines?

12. State the towns were offices are established for the sale, distribution, or advertisement of A. R. INDUSTRIES INC., a corporation, buffing machines.

13. State the towns where offices are established for sale, distribution or advertisement of A. R. INDUSTRIES INC., a corporation, merchandise.

14. State what products the A. R. INDUSTRIES INC. a corporation, manufactures other than buffing machines.

15. If your answer to the above question 14 is yes, state what A. R. INDUSTRIES INC., a corporation, manufactures.

(a) Where it is manufactured.

(b) The number of each product manufactured and distributed in the years 1963, 1964, and 1965.

16. State the geographical territory traveled by each of the salesmen or agents of

A. R. INDUSTRIES INC., a corporation, in the sale, distribution or advertisement of buffing machines.

17. State whether during the year 1965, between January 1 and May 5, 1965, A. R. INDUSTRIES INC., a corporation, had in its employment any person charged with the responsibility of selling the products manufactured by A. R. INDUSTRIES INC., a corporation.

18. If the answer the the above question 17 is yes, state the names and addresses of said persons and the last time employed by A. R. INDUSTRIES INC., a corporation.

19. If A. R. INDUSTRIES INC., a corporation, did not advertise parts for sale during the years 1963, 1964, and 1965, and if A. R. INDUSTRIES INC., a corporation, did not have a salesman employed during those said years, state the method employed by A. R. INDUSTRIES INC., a corporation, in the sale of products manufactured by A. R. INDUSTRIES INC., a corporation, giving the details of such method of selling goods.

20. If A. R. INDUSTRIES INC., a corporation, sold certain buffing machines to FORMICA CORPORATION within the State of California, please attach copies of invoices, sales slips, or purchase orders relative to such sale of buffing machines for the years 1963, 1964, and 1965.

21. To your knowledge, were any products manufactured and/or sold by A. R. INDUSTRIES INC., a corporation, to be used in the State of California during the year 1963?

22. To your knowledge, were any products manufactured and/or sold by A. R. INDUSTRIES INC., a corporation, to be used in the State of California during the year 1964?

23. To your knowledge, were any products manufactured and/or sold by A. R. INDUSTRIES INC., a corporation, to be used in the State of California during the year 1965?

24. Approximately how many products manufactured by A. R. INDUSTRIES INC., a corporation, were used to your knowledge in the State of California in the year 1963, stating the kind of product as well as the number thereof?

25. Approximately how many products manufactured by A. R. INDUSTRIES INC., a corporation, were used to your knowledge in the State of California in the year 1964, stating the kind of product as well as the number thereof?

26. Approximately how many products manufactured by A. R. INDUSTRIES INC., a corporation, were used to your knowledge in the State of California in the year 1965, stating the kind of product as well as the number thereof?

27. In the year 1964 did A. R. INDUSTRIES INC., a corporation, sell buffing machines or machinery to FORMICA CORPORATION or AMERICAN CYANAMID COMPANY to be used in the State of California?

(a) If your answer to the above is yes, state the representative of FORMICA CORPORATION to whom you sold these products.

(b) The location or place to which you delivered these products.

(c) The method or transportation by which these products were brought from your manufacturing plant to their ultimate destination.

(d) Where were the contracts for the purchase of these buffing machines negotiated.

(e) The names and addresses of the persons negotiating said contracts.

(f) The place where the signatures were affixed to said contracts.

(g) If products were sold to AMERICAN CYANAMID COMPANY within the State of California, state the representative of the AMERICAN CYANAMID COMPANY to whom you sold these products.

(h) The place or location to which you delivered these products.

(i) The method of transportation by which these products were brought from your manufacturing plant to their ultimate destination.

(j) Where the contracts for the purchase of these buffing machines were negotiated.

(k) The names and addresses of the persons negotiating said contracts.

(l) The place where the signatures were affixed to said contracts.

28. In the year 1965 did A. R. INDUSTRIES INC., a corporation, sell buffing machines or machinery to FORMICA CORPORATION or AMERICAN CYANAMID COMPANY to be used in the State of California?

(a) If your answer to the above is yes, state the representative of FORMICA CORPORATION to whom you sold these products.

(b) The location or place to which you delivered these products.

(c) The method of transportation by which these products were brought from your manufacturing plant to their ultimate destination.

(d) Where were the contracts for the purchase of these buffing machines negotiated.

(e) The names and addresses of the

persons negotiating said contracts.

(f) The place where the signatures were affixed to said contracts.

(g) If products were sold to AMERICAN CYANAMID COMPANY within the State of California, state the representative of the AMERICAN CYANAMID COMPANY to whom you sold these products.

(h) The place or location to which you delivered these products.

(i) The method of transportation by which these products were brought from your manufacturing plant to their ultimate destination.

(j) Where the contracts for the purchase of these buffing machines were negotiated.

(k) The names and addresses of the persons negotiating said contracts.

(l) The place where the signatures were affixed to said contracts.

29. State the hands through which your product passed in leaving the plant of A. R. INDUSTRIES INC., a corporation, before arriving into the possession of the ultimate consumer or user in the State of California, during the year 1963.

30. State the hands through which your product passed in leaving the plant of A. R.

INDUSTRIES INC., a corporation, before arriving into the possession of the ultimate consumer or user in the State of California, during the year 1964.

31. State the hands through which your product passed in leaving the plant of A. R. INDUSTRIES INC., a corporation, before arriving into the possession of the ultimate consumer or user in the State of California, during the year 1965.

32. State whether the name of your company is listed in any telephone directory published in the State of California during the year 1963.

(a) If you have answered the above yes, state the name of each telephone directory published or used in the State of California in the year 1963.

33. State whether the name of your company is listed in any telephone directory published in the State of California during the year 1964.

(a) If you have answered the above yes, state the name of each telephone directory published or used in the State of California in the year 1964.

34. State whether the name of your company is listed in any telephone directory published in the state of California during the year 1965.

(a) If you have answered the above yes, state the name of each telephone directory published or used in the State of California in the year 1965.

35. What method of transportation was used to transport the buffing machine sold to the FORMICA CORPORATION by date of order June 3, 1965 from the place of manufacture to the ultimate destination in the State of California, that place being FORMICA CORPORATION, Roseville, California?

36. Was the buffing machine in question transported from the manufacturing plant at A. R. INDUSTRIES INC., a corporation, to the State of California by truck?

(a) If the answer to the above is yes, was it transported F. O. B. ?

37. Was the contract entered into between the FORMICA CORPORATION and A. R. INDUSTRIES INC., a corporation, under date of order June 3, 1965, for one buffing machine for the price of $5,990.00, entered into by way of a conditional sales contract?

(a) If the answer to the above is yes, the place of said contract?

(b) The name and address of the institution, if any, in which the contract funds were placed.

38. If the sale of the buffing machine in

question was not done by a conditional sales contract, what type of contract was entered into?

(a) The place the contract was entered into.

(b) The name and address of the institution, if any, in which the contract funds were placed.

39. That prior to May 14, 1965, did A. R. INDUSTRIES INC., a corporation, have an agent, employee, sales representative, or any representative of said company within the State of California for the purpose of negotiating the sale of A. R. INDUSTRIES INC., a corporation, product?

40. Were any contracts for the sale of, lease of, or rental of buffing machines of A. R. INDUSTRIES INC., a corporation, entered into in the State of California in the year 1963?

41. Were any contracts for the sale of, lease of, or rental of buffing machines of A. R. INDUSTRIES, INC., a corporation, entered into in the State of California in the year 1964?

42. Were any contracts for the sale of, lease of, or rental of buffing machines of A. R. INDUSTRIES INC., a corporation, entered into in the State of California in the year 1965?

43. If your answer to interrogatory No. 40 was yes, state the date and place of said

contract.

44. If your answer to interrogatory No. 41 was yes, state the date and place of said contract.

45. If your answer to interrogatory No. 42 was yes, state the date and place of said contract.

DATED: March 28, 1968.

O'CONNOR & LEWIS

By /s/ Jack Charles Sevey
JACK CHARLES SEVEY
Attorney for Plaintiff

EXHIBIT "C"

RUST, HOFFMAN,
MILLS & NEWLAN
Suite 502, IBM Building
520 Capitol Mall
Sacramento, California 95814

TELEPHONE: 444-5805
(Area Code 916)

Attorneys for Defendants
A. R. Industries, Inc.

ENDORSED:
Filed

APR 17 1968

W. N. DURLEY, CLERK
By A. Attiyeh, Deputy

IN THE SUPERIOR COURT
OF THE STATE OF CALIFORNIA
IN AND FOR
THE COUNTY OF SACRAMENTO

FRANK CERVANTES,
Plaintiff,

vs.

A. R. INDUSTRIES, INC.,
et al.,
Defendants.

ANSWERS TO INTERROGATORIES

C-22.

COMES NOW defendant A. R. INDUSTRIES, INC., a corporation, and answers the interrogatories propounded to it as follows:

1. Ohio corporation.
2. St. Bernard, Hamilton County, Ohio.
3. Beech Street and Railroad Avenue, St. Bernard, Ohio 45217.
4. Yes.
5. No.
   (a) N/A.
   (b) N/A.
6. No. Mr. W. A. Olsen, Formica Corporation, Subsidiary of American Cyanamid Company, Barden Avenue, Wayne, New Jersey requested this quotation, and it was directed to him at that address.
   (a) See above.
   (b) Mr. John Riggs, estimator.
7. Yes.
   (a) October 11, 1965.
   (b) I. M. L. Freight, Inc., (a common carrier, by truck.)
   (c) A. R. Industries, Inc.
   (d) Yes.
8. Four.
9. One machine was ordered in December, 1964 and subsequently delivered in the spring of 1965 to Formica Corporation, Cincinnati, Ohio.
10. None.
11. No.
12. None.
13. St. Bernard, Hamilton County, Ohio.
14. Job shop machining, weldments and special machinery to customer specifications and concrete lintel machines.
15. (a) St. Bernard, Hamilton County, Ohio.

(b) Three precasters were manufactured during this period. Other than lintel machines, products were only manufactured on special order for customers.

16. There are no such salesmen or agents of A. R. Industries.

17. Yes.

18. Mr. Carl J. Albert, 4449 Raceview Avenue, Cincinnati, Ohio 45211. Mr. Albert is still in the employ of A. R. Industries, Inc.

19. ---

20. A. R. Industries did not sell any buffing machines through the Formica Corporation within the State of California, the sales of buffing machines between A. R. Industries and Formica took place between the States of Ohio and New Jersey.

21. No.

22. No.

23. Yes.

24. None to our knowledge.

25. None to our knowledge.

26. Three buffing machines. One cement lintel machine, which transaction was negotiated and executed in Cincinnati, Ohio.

27. No.

(a) N/A.
(b) N/A.
(c) N/A.
(d) N/A.
(e) N/A.
(f) N/A.
(g) N/A.
(h) N/A.
(i) N/A.
(j) N/A.

(k) N/A.

(l) N/A.

28. Yes.

(a) Mr. W. A. Olsen, Wayne, New Jersey.

(b) Roseville, California.

(c) I. M. L. Freight, Inc. (a common carrier, by truck).

(d) Between Ohio and New Jersey.

(e) Mr. W. A. Olsen, Formica Corporation, Subsidiary of American Cyanamid Company, Barden Avenue, Wayne, New Jersey and Mr. John Riggs, Beech Street and Railroad Avenue, St. Bernard, Ohio 45217.

(f) Mr. Riggs executed the contracts in St. Bernard, Ohio and Mr. Olsen executed the contracts in New Jersey.

(g) N/A.

(h) N/A.

(i) N/A.

(j) N/A.

(k) N/A.

(l) N/A.

29. N/A.

30. N/A.

31. I. M. L. Freight, Inc.

32. No.

(a) N/A.

33. No.

(a) N/A.

34. No.

(a) N/A.

35. I. M. L. Freight, Inc.

36. Yes.

(a) Yes.

37. No.

(a) N/A.

(b) N/A.

38. Unsecured sale on purchase order, the purchase order being sent to and paid from Wayne, New Jersey.

(a) See answer to Interrogatory No. 28. (f).

(b) None.

39. This interrogatory is objectionable as being vague and ambiguous. The interrogatory appears to be directed as to whether A. R. Industries have an agent, employee, sales representative, or any representative of said company within the State of California for the purpose of negotiating the sale of A. R. Industries' products. A. R. Industries, Inc. has never had an agent, employee, sales representative, or any representative of said company within the State of California for the purpose of negotiating the sale of the products of A. R. Industries, Inc.

40. No.

41. No.

42. No.

43. N/A.

44. N/A.

45. N/A.

Dated: April 5, 1968.

RUST, HOFFMAN & MILLS
Attorneys for A. R. Industries

By Michael C. Gessford
Michael C. Gessford

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1968

No.

A. R. INDUSTRIES, INC., a corporation,
Petitioner,

vs.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF SACRAMENTO,
Respondent,

and

FRANK CERVANTES,
Real Party in Interest.

ANSWER TO PETITION FOR WRIT OF CERTIORARI

The Real Party in Interest prays that a writ of certiorari be denied.

CITATIONS TO OPINIONS BELOW

The opinion of the trial court on petitioner's motion to quash service of summons is incorporated in the

petition for Writ of Certiorari, and the real party in interest incorporates that herein by reference. The opinion of the Court of Appeal, Third Appellate District, State of California is reported in 268 A.C.A. 344, and a copy of said opinion is printed and set forth in petitioner's request for Writ of Certiorari and the real party in interest adopts that hereto.

QUESTIONS PRESENTED

Whether on the facts of this case, maintenance of the present suit in California deprives petitioner of its rights under the Due Process Clause of the Fourteenth Amendment of the United States Constitution.

STATEMENT

That on or about the 3rd day of June, 1966, the Formica Corporation, a subsidiary of American Cyanamid Company of Wayne, New Jersey, contracted with the petitioner, A. R.. Industries, Inc., for the manufacture of three buffing machines, total weight: 22,800 lbs. This contract took place between the two corporations, one being in New Jersey and the other being in Ohio. The contract specifically provided that the machines were to be manufactured for the Formica Corporation plant in Roseville, California. The machines were sent to Roseville, California f.o.b.

It is undisputed that the petitioner is not, and never has been, licensed or authorized by the Secre-

tary of State to do business in the State of California. The petitioner does not, and never has, maintained offices in the State of California. That the petitioner is not, and never has been, qualified with any governmental agency in the State of California. That the petitioner does not own any real or personal property in the State of California. That the petitioner has advertised in national media.

REASONS FOR DENYING WRIT OF CERTIORARI

The petition for Writ of Certiorari should not be granted in this case because the opinion of the Court of Appeal is in conformity with prior decisions of the United States Supreme Court and the State of California, and does not result in deprivation of petitioner's right under the Due Process laws of the United States Constitution.

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

The petitioner's argument regarding the reasoning behind the Court of Appeal's decision is wholly without merit. An analysis of the Court's decision indicates that the Court of Appeal reached its decision based on the complete factual picture and not merely one isolated fact. The facts on which the appellate court reached its decision are as follows:

1. Bids were sent out by Formica Corporation to build a buffing machine to certain specifications to be built for the Formica Plant in Roseville, California.

2. The machine was built to be sent to California.

3. The petitioner knew the machine would be sent f.o.b. and this was included in the sales price.

4. The petitioner knew the machine would be used by California residents.

5. The petitioner knew that if any accident occurred it would occur in California to a California resident.

6. This is the type of product that was of such a large size and natur that the market was understandably restricted.

7. This is not a product which ultimately came into California, but it was designed, manufactured and sold knowing specifically that it was to be shipped and used in the State of California.

8. The contract was not completed until delivered in California as indicated by the requirements f.o.b. Roseville, California.

9. There had been a delivery of one lintel machine to California prior to the date this buffing machine was sent to California.

10. The petitioner advertised in national media. For the first time, the petitioner now claims that he did not advertise in any midwestern states. It should be brought to the Court's attention that this did not appear in the affidavit filed on behalf of petitioner.

11. The Real Party in Interest has the burden of proving the defect.

12. The medical witnesses are located in California.

13. The witnesses to the accident are located in California.

The Court of Appeal in its opinion, states that in order to have jurisdiction over an out-of-state defendant there must be certain "minimum contacts" with the state so that the maintenance of the suit does not offend traditional notions of fair play and substantial justice. *International Shoe Company v. Washington,* 326 U.S. 310, 316 (90 L.Ed. 95, 102, 66 S.Ct. 154, 161).

> "International Shoe was cited and its concept was repeated thusly by our Supreme Court in *Fisher Governor Co. v. Superior Court* (1959) 53 Cal.2d 222, at page 224: 'Code of Civil Procedure, section 411, subdivision 2, authorizes service of process on foreign corporations that are "doing business in this State." That term is a descriptive one that the courts have equated with such minimum contacts with the state "that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"'"

The petitioner relies heavily on the case of *Hansen v. Denckla,* 357 U.S. 235. In this regard the case of *Phelps v. Anchor Hocking Glass Corporation,* 413 P. 2d 732, analyzes the *Hansen v. Denckla* case as follows:

> "It has been nearly a decade since the United States Supreme Court handed down *Hansen v. Denckla,* supra. That case was an unusual situation in which the Court achieved substantial

justice, *but it is of questionable value as a precedent regarding the problem of personal jurisdiction over non-resident defendants.* In that opinion, the majority affirmed the *McGee* principle that a defendant renders himself amenable to jurisdiction by committing a single act within the forum state. The majority went on to say: '. . . It is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protection of its laws.' Cited at 357 U.S. at page 253, *Hansen v. Denckla.*

". . . This statement has caused State Courts some concern which is discussed below. *We do not think the quoted language can be construed literally.* To do so is to revitalize the implied consent theory emasculated by the *International Shoe* case and to reverse the trend expanding state jurisdiction over non-residents which trend was recognized in the *Hansen* decision. To make the requirement of purposeful activity within the state a necessary prerequisite to personal jurisdiction in all cases undermines the notion that the facts of each case must be examined to decide whether it is fair to exercise jurisdiction over the defendant. Furthermore, it is apparent that all personal jurisdiction questions cannot be determined by asking whether the defendant purposefully conducted activities within the forum state to obtain the benefits and protections of its laws. *Tortious and negligent acts are obvious examples in which it is unrealistic to say that the actors first considered the laws of the state in which such acts were committed. A rule limiting juris-*

diction to defendants who purposefully conduct activities within the state cannot properly be applied in product liability cases in view of the fortuitous route by which products enter any particular state. Cummins, In Personam Jurisdiction Over Nonresident Manufacturers in Product Liability Actions, 63 Mich. LR 1028. (Emphasis added.)

"A fair reading of the *Hansen* decision leads us to the conclusion that the Supreme Court is concerned with our federalism. State boundaries may be as easily erased by the enhancement of state power as by the expansion of national authority. . . . But the *Hansen* case does not affect the test of personal jurisdiction over non-resident defendants established in *International Shoe.* We are still required to determine whether it is fair to exercise jurisdiction over the defendant.

"The next question is how far the states have extended jurisdiction over non-resident defendants in product liability cases. Many decisions were compiled by Professor Cleary in The Length of The Long Arm, 9 Journal of Public Law 293, where he first notes that distinctions in principle no longer exist between individuals and corporations for purposes of jurisdiction. He then concludes state courts hold that the commission of a tort within the territory of the forum, or sustaining injury within the territory of the forum from a tort committed elsewhere is a sufficient contact upon which to base jurisdiction over the defendant as regards that tort. See also Developments in the Law—State-Court Jurisdiction, 73 Harv. LR 909. Professor Cleary includes product liability cases in the tort category.

> "In the most recent product liability cases state courts have held it is fair to exercise personal jurisdiction over non-resident defendants though his only contact with the forum was that the defective product caused the plaintiff's injury there. But the courts have been concerned about the language in *Hansen* quoted above and have felt constrained to require that the presence of the defendant's product in the jurisdiction must have been a foreseeable event. Apparently, foreseeability is supposed to satisfy the *purposeful activity* language of *Hansen*." (Emphasis added.)

The petitioner was, in fact, doing business within the State of California, had such minimum contacts with the State of California as to satisfy the due process requirements. It is true that A. R. Industries, Inc., maintained no office, owned no property or sent any traveling salesmen into California, but they did advertise in a national media and the product which we are concerned with was sold for the specific purpose of being shipped to California to be used at the Formica Plant, Roseville, California. The product was shipped f.o.b., meaning that the contract was not finished until the sale was completed on delivery thereof. Considering all of the other facts that the bids were sent out from Formica to build it for its California plant, the machine was built to be sent to California, the petitioner knew the machine would be sent f.o.b. and this was included in the sales price, the petitioner knew the machine would be used by California residents, the petitioner knew that if an accident occurred it would occur in California, that

this was a product of such a large size and nature that the market was restricted, that this is not a product which ultimately came to California, but it was designed, manufactured and sold knowing it was to be shipped and used in California, that the petitioner advertised in a national media, that the Real Party in Interest has the burden of proving the defect, and that all lay and medical witnesses and expert witnesses were in California, the Real Party in Interest respectfully submits that the A. R. Industries, Inc., has in fact, met the minimum requirements as set forth in the *International Shoe* case, supra. Further A. R. Industries, Inc., in fact, has purposefully availed itself of the privilege of conducting activities in a foreign state by the use of the national media as well as the shipping of the product f.o.b. California, and as stated in the *Hansen* case, supra, the foreseeability of defendant's products in the jurisdiction is supposed to satisfy the purposeful activity language in *Hansen,* which states that it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the foreign state, thus invoking the benefits and protection of its laws. This foreseeability thereby creates the purposeful activity language and therefore, the requirements of *Hansen v. Denckla,* that it is essential that there be some act by which a defendant purposefully avails itself of the privilege of conducting activities in a foreign state thus invoking the benefits and protection of its laws has in fact been satisfied.

CONCLUSION

Therefore, in analyzing the case on a whole it can be seen that the Court of Appeal analyzed the complete factual situation now before this Court and found that the minimum contact requirement had been met and therefore there was jurisdiction by the Courts of California and for this reason the petition for hearing should be denied.

Therefore, it is respectfully requested that the Petition for Certiorari be denied and that the Real Party in Interest be awarded his costs on appeal.

Dated, Sacramento, California,
June 6, 1969.

Respectfully submitted,
JOHN QUINCY BROWN, JR.,
Attorney for
Real Party in Interest.